91-1201

Supreme Court, U.S.
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No._____

United States Supreme Court

October, 1991 Term

Vincent F. Shutt,
Petitioner,

v.

Sandoz Crop Protection Corporation,
a New York corporation;
Zoecon Corporation,
a Delaware corporation,
Respondents.

Petition For Writ of Certiorari
to the United State Court of Appeals
for the Ninth Circuit

PETITION FOR CERTIORARI

Richard R. Johnson
VELIKANJE, MOORE &
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QUESTIONS PRESENTED FOR REVIEW

1. Should the ruling of the Ninth Circuit Court of Appeals be reversed because it held there was "too small" of a statistical pool of employees to determine if petitioner had been discriminated against by the respondents on the basis of age under the Age Discrimination In Employment Act, 29 U.S.C. Secs. 621-634?

2. Should the ruling of the Ninth Circuit Court of Appeals be reversed in that the legal basis it used to reverse the District Court was raised by the respondents only for the first time on appeal?

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OFFICIAL REPORTS OF OPINIONS

The citation of the official opinion of the Ninth Circuit Court of Appeals, of which review is sought in this matter, is 934 F.2d 186 (9th Cir., 1991) (which superseded a previous opinion of the court found at 923 F.2d 722 (9th Cir., 1991).

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the Ninth Circuit Court of Appeals, of which review is sought here, was filed and entered on September 30, 1991.

Petitioner seeks review here pursuant to 28 U.S.C. Sec. 1254 (1).

STATEMENT OF THE CASE

Petitioner's action was instituted in the Superior Court of Washington, and was timely removed to the U.S. District Court for the Eastern District of Washington.

Diversity of citizenship exists under 28 U.S.C. Sec. 1332, and federal question jurisdiction also exists under 28 U.S.C. Sec 1331 in that petitioner sought recovery under 29 U.S.C. Secs. 621-634.

Petitioner Vincent F. Shutt, who was age 56 when terminated, was a long time and successful employee of Zoecon Corporation, engaged in selling agricultural chemicals. Zoecon Corporation was acquired by Sandoz Corporation. It had also acquired the agribusiness of Velsicol Chemical Corporation.

Following acquisition of Velsicol, a new business known as V.S. Crop Protection Corporation was formed. In May, 1986 Sandoz Corporation announced its intent to merge the sales forces of Zoecon Corporation and V.S. Crop Protection Corporation to form a new business known as Sandoz Crop Protection Corporation.

V.S. Crop Protection Corporation had 85 sales representatives. Only 20 were over age 40. Zoecon had 21 sales people. 11 were over age 40.

The total of the V.S. Crop Protection and Zoecon sales people was 106. Sandoz Crop Protection Corporation was set up to have 79 sales people. So, there were 27 too many sales people for the new company. However, only 11 sales people were actually terminated. The other 16 were not in consideration for sales positions because they quit, were moved to other positions, etc.

Of the 11 sales people who were terminated, 4 were from V.S. Crop Protection Corporation and 7 were from Zoecon Corporation. Of the 4 V.S. Crop Protection people terminated 2 were under age 40.

Of the 7 Zoecon Corporation people terminated only 1 was under age 40. So, 85.7%

of the Zoecon people terminated were over age 40.

Of the 11 sales people from both V.S. Crop Protection and Zoecon who were terminated, only 3 were under age 40. So, 72.7% of the total number of people terminated from both companies were over age 40.

Of the 79 sales people retained by Sandoz Crop Protection Corporation, only 11 were over age 40. So, 86.1% of the sales force of the new company was under age 40.

The decision to retain or terminate sales people was based entirely on subjective evaluations.

Petitioner's discharge was effective July 15, 1986. His former sales territory with Zoecon was covered by 4 salesmen of the new company. 3 of these men were under age 40. The other man was age 40. Accordingly,

all of the replacements were younger than Shutt.

The District Court ruled in Shutt's favor on a "disparate impact" basis, shown by statistical evidence. The discriminatory effect of the subjective evaluation employment practice, although facially neutral, had a harsh, disparate and discriminatory impact on people over age 40. See, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988).

The respondents here appealed the District Court judgment against them to the Ninth Circuit Court of Appeals.

On appeal, for the first time, the respondents claimed that the statistical pool of employees the District Court had before it was "too small" in number to establish a sufficient statistical pattern to conclude age discrimination had occurred. This was an

issue that was not raised in the District Court by the respondents.

The Ninth Circuit Court of Appeals concluded that the 11 person group of people from V.S. Crop Protection and Zoecon, who were fired, was "so small" that it could not suffice to establish a case of "disparate impact" age discrimination.

Relying on Sengupta v. Morrison-Knudson Co., 804 F.2d 1072 (9th Cir., 1986), the appeals court reversed and remanded to the District Court with instructions to enter judgment for the respondents.

ARGUMENT

The statistical evidence produced at trial did not rely only upon what happened to the 21 sales employees of the Zoecon Corporation, or only upon what happened to the 85 sales people of V.S. Crop Protection

Corporation. The evidence went to the entire 106 sales people of **both** companies that were being considered for merger to form the sales force of the new company - Sandoz Crop Protection Corporation.

The statistical evidence was directed at the entire 11 men who were terminated from **both** of the companies that were being merged to form the sales force of the new company.

Sengupta v. Morrison-Knudson Co., supra, was a Title VII case. Mr. Sengupta was an engineer who was assigned to the employer's mining group. The mining group was comprised of 281 employees, and was divided into different departments. Sengupta was assigned to department 222, which had 28 employees in it.

In Sengupta, the trial court was affirmed by the appeals court, holding that Sengupta's use of the pool of only 28 total employees of

department 222, rather than the entire 281 employees of the mining group, as a statistical basis, was improper. The appeals court said the whole 281 employees of the mining group should have been considered.

The Sengupta court recognized that sometimes courts must rely on statistics derived from small sample groups. To not do so would deny employees in small companies some of the protections that anti-discrimination statutes seek to provide. 804 F.2d at 1076.

The Ninth Circuit Court of Appeals recognized, in its amended opinion from which this review is sought, that Shutt had presented evidence regarding the entire sales forces of **both** companies being merged, and of the entire number of people from **both** companies who were fired. However, it still mistakenly concluded that the number of people

fired - 11 - was too small to establish a statistical pattern that could "conclusively" be identified as discriminatory. 934 F.2d at 189.

By so holding, not only does the Ninth Circuit place itself in this case in conflict with its own opinion in the Sengupta case, but cases from other circuits as well. See, Equal Employment Opportunity Commission v. American National Bank, 652 F.2d 1176 (4th Cir., 1981); Pegues v. Mississippi State Employment Service of the Mississippi Employment Security Commission, 699 F.2d 760 (5th Cir., 1983), and MacDissi v. Valmont Industries, Inc., 856 F.2d 1954 (8th Cir., 1988).

Basically, what the Ninth Circuit is saying in this case is there is no way that any kind of disparate impact age discrimination case could have been made arising out of this merger because there just

weren't enough people employed by V.S. Crop Protection Corporation and/or Zoecon Corporation!

What more could Shutt have done in this case? Petitioner respectfully directs the court's attention to MacDissi v. Valmont Industries, Inc., supra, where the Eighth Circuit held that:

> "Taken to its logical conclusion, Valmont's position is that plaintiffs employed in smaller work places can never use statistics to establish a circumstantial case of discrimination, since the size of the work place precludes any pattern observed in the data from proving intentional discrimination to a statistical certainty. This approach would unjustifiably deny employees in smaller work places the protection of federal discrimination law. (Citation omitted). There is no minimum sample size prescribed either in federal law or in statistical theory; the adequacy of numerical comparisons within small sets of data depends on the degree of certainty the finder of fact requires, as well as the type of inference the statistics are meant to demonstrate." 856 F.2d at p. 1058.

Is the Ninth Circuit Court of Appeals going to embark on a position that there is some minimum number of employees that must be employed in any case before a circumstantial case of disparate impact age discrimination can be made? Isn't this really a question of fact for the finder of fact in this case - the District Court judge?

Additionally, the petitioner is at a loss of understand why the Ninth Circuit Court of Appeals is even considering the "too small" of a pool of employees issue when it was raised by respondents here for the very first time on appeal?

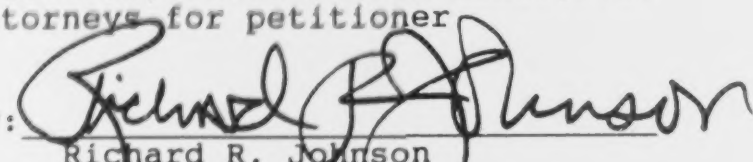
As a general rule, a court of appeals will not consider an issue not raised in the trial court. Schlesinger v. Councilman, 420 U.S. 738 (1975) and K-2 Ski Company v. Head Ski Company, Inc., 506 F.2d 674 (9th Cir., 1974).

CONCLUSIONS

This case should be recognized for what it is - a factual matter that was properly decided by the District Court on the evidence which was before it at trial. The opinion of appellate court should be reversed withdirection that the judgment of the District Court should be affirmed.

Respectfully submitted,

VELIKANJE, MOORE & SHORE, INC., P.S.
Attorneys for petitioner

By: 
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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VINCENT F. SHUTT,
Plaintiff-Appellee,

v.

SANDOZ CROP PROTECTION CORPORATION, a New York corporation; ZOECON CORPORATION, a Delaware corporation,
Defendants-Appellants.

No. 89-35502

D.C. No. 87-166-AAM

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Alan A. McDonald, District Judge, Presiding

Argued and Submitted
December 4, 1990—Seattle, Washington

Filed January 16, 1991
Amended September 30, 1991

Before: Alfred T. Goodwin, Chief Judge, Eugene A. Wright and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Employment Discrimination

Reversing and remanding a district court judgment, the court of appeals held that an employment practice, neutral on

its face, did not reveal a disparate impact of age discrimination effect that could be shown by statistical evidence.

Vincent F. Shutt from Washington State brought suit against appellant Sandoz Crop Protection Corporation alleging unlawful employment discharge in violation of ADEA. Throughout the period of employment with Sandoz, Shutt's performance appraisals indicated his work was satisfactory. However, under a merger with another company and subsequent reorganization, Shutt was terminated from his employment. All the persons making decisions for the merged company were former managers of the other company. The decision to terminate was based on subjective evaluation of the work of the salesmen. Shutt's sales territory was then covered by four former salesmen of the other company, of whom three were under 40. The district court concluded that, from the statistical evidence, it was apparent that there was a youth movement within the new company. Therefore, the case was decided as a "disparate impact" case where the discriminatory effect of an employment practice, neutral on its face, was shown by statistical evidence. Judgment was entered for Shutt.

[1] It is established that a subjective method of selection may constitute an employment practice having a disparate, discriminatory impact. At the same time, once the practice has been identified, the statistical disparities must be sufficiently substantial that they raise an inference of causation. The statistical evidence may not be probative if the data are small or incomplete. [2] The district court reached its conclusion as to discriminatory impact by looking, without explanation, at an exceedingly small class of employees, the 21 former salesmen of the merged company. To carve out the former employees from the merged company was arbitrary. That the managers from the new company favored their former employees, although favoritism, was not age discrimination. [3] The group was so small, however, that it did not suffice to estabish a statistical pattern that could be identified as discriminatory.

[4] There was no necessity here to employ a small group. The relevant pool was 106 sales persons. When that pool was considered, no disparate impact was shown. [5] Shutt also failed to state a claim of disparate impact age discrimination under Washington law. In Washington, disparate impact analysis does not extend to subjective, discretionary employment practices. Accordingly, the case was remanded with instructions that judgment be entered for the defendants.

COUNSEL

Paul J. Cherner, Paul E. Bateman, Steven L. Hamann, Sachnoff & Weaver, Chicago, Illinois, for the defendant-appellant Sandoz Crop Protection Corporation.

John S. Moore, Richard R. Johnson, Velikanje, Moore & Shore, Yakima, Washington, for the plaintiff-appellee Shutt.

ORDER

The opinion filed January 16, 1991 and amended May 31, 1991, is further amended as follows:

1. Slip op. at 6697, last paragraph, strike "Of the Zoecon salesmen six were terminated," and replace with:

> In the entire pool of V.S. Crop and Zoecon employees, there were 32 employees over 40 and 74 employees under 40 before the reduction in force. Of the 21 Zoecon salesmen 11 were 40 or older and 10 were under 40. Six of the Zoecon salesmen were terminated,

2. Slip op. at 6697, after last line of last paragraph, add:

In all, 21 of the 85 original V.S. Crop sales representatives were over 40.

3. Slip op. at 6699, line 9 of second paragraph, replace "To carve out the former Zoecon employees was arbitrary." with:

All employees of the merged corporations were reviewed subjectively; to carve out the former Zoecon employees was arbitrary.

4. Slip op. at 6700, lines 2-3, add "alone" between "not" and "suffice" and add "conclusively" between "could" and "be".

5. Slip op. at 6700, lines 7-8, strike "is not large enough to" and replace with "does not".

OPINION

NOONAN, Circuit Judge:

Vincent F. Shutt, a citizen of the state of Washington, brought suit against Sandoz Crop Protection Corporation (Sandoz), a New York corporation, and Zoecon Corporation (Zoecon), a Delaware corporation, alleging that he had been discharged by the defendants in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Washington law against discrimination, Wash.Rev.Code Ann. § 49.60 *et seq.* After a bench trial judgment was given for Shutt. We reverse.

FACTS

Shutt was born on April 3, 1930. He went to work for the Crop Protection Division of Sandoz in January 1980 as a

salesman of agricultural chemicals. His territory included Washington, Oregon, Idaho, and Montana. In 1984 Sandoz acquired Zoecon, and Shutt was then employed by the Crop Protection Division of Zoecon.

Throughout the period of employment by Sandoz and Zoecon Shutt's performance appraisals indicated that his work was satisfactory. For the first six months of 1986 his sales of the various pesticides for which he was responsible were in excess of the budget assigned to him for his territory.

In the spring of 1986 Sandoz bought the agribusiness of Velsicol Chemical Corporation. Following the sale this business was known as V.S. Crop Protection Corporation (V.S. Crop). In May 1986 Sandoz announced its intent to merge the Crop Protection Division of Zoecon with V.S. Crop, effective June 2, 1986. As of this date the Crop Protection Division of Zoecon became subject to the management of V.S. Crop.

V.S. Crop was a much larger operation than Zoecon. Its sales in 1985 totaled $100 million, while Zoecon's were $21 million. V.S. Crop had 85 sales representatives, Zoecon 21. V.S. Crop's sales were dominated by a few products such as Banvel, a dicamba-based herbicide. Zoecon's products did not include Banvel or any other dicamba-based pesticide.

In the reorganization under the supervision of V.S. Crop, 79 sales territories were created. Because the combined sales forces of Zoecon and V.S. Crop totaled 106 salesmen, there were 27 more sales representatives than there were sales territories. It became a business necessity for a number of salesmen to be terminated. All of the persons making decisions for the merged company were former managers of V.S. Crop.

In the entire pool of V.S. Crop and Zoecon employees, there were 32 employees over 40 and 74 employees under 40 before the reduction in force. Of the 21 Zoecon salesmen 11 were 40 or older and 10 were under 40. Six of the Zoecon

salesmen were terminated, one was given a chance to transfer, and 14 were retained. Of the six who were terminated, five were 40 or older. Shutt was among those terminated. Of the V.S. Crop salesmen terminated, two were over 40 and two were under 40. In all, 21 of the 85 original V.S. Crop sales representatives were over 40.

The decision to terminate was based on subjective evaluation of the work of the salesmen. As the new managers were not familiar with Zoecon they relied in part on a ranking of salesmen for Zoecon made by its former national sales director. This ranking was not followed slavishly. For example, Mike Svoboda, age 63, who was ranked eighth in the Western Region, was offered a chance at a transfer, while Shutt, who was ranked seventh in the Western Region, was fired. In the Eastern Region the two men at the top of the list, who were over 40, were retained, but of the five men at the bottom of the list two were also retained who were under 40 and three were discharged who were respectively 66, 38 and 54. The trial court concluded that the list had not been relied on.

Shutt's discharge was effective July 15, 1986. His territory was then covered by four former V.S. Crop salesmen, of whom three were under 40.

PROCEEDINGS

Shutt brought suit, charging age discrimination. The district court concluded as a matter of law that

> "the manner in which the structure of the new company's sales organization was decided, and the practices used by the defendants in selecting which individual sales representatives from Velsicol/V.S. Crop Protection and Zoecon would be retained or terminated, although facially neutral in appearance, had a harsh, disparate and discriminatory impact upon Zoecon sales representatives age 40 and over,

> including the plaintiff. The statistical evidence in this regard is compelling, and no reasonable trier of fact could ignore it. It is apparent from the evidence that there was a youth movement within the new company."

The district court gave judgment for the plaintiff. The defendants appealed.

ANALYSIS

[1] This case was decided as a "disparate impact" case where the discriminatory effect of an employment practice, neutral on its face, is shown by statistical evidence. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988). It is established that a subjective method of selection may constitute such an employment practice. *Id.* at 991. At the same time it has been cautioned that once the practice has been identified, the statistical disparities must be "sufficiently substantial that they raise . . . an inference of causation." *Id.* at 995. The statistical evidence may not be probative if the data are "small or incomplete." *Id.* at 996-97.

[2] The district court reached its conclusion as to discriminatory impact by looking at an exceedingly small class of employees, the 21 former salesmen of Zoecon. The district court offered no explanation why it chose this segment of the merged company as its sample. True, these persons had once worked for Zoecon as a separate entity, but the Zoecon salesmen had been merged with sales representatives from V.S. Crop and there was a single business with sales representatives that now numbered 106. All employees of the merged corporations were reviewed subjectively; to carve out the former Zoecon employees was arbitrary. No doubt the V.S. Crop managers favored their former employees: that may have been favoritism, it was not age discrimination. When a merger occurs, it is often the harsh reality that one company is dominant and the other company's employees are more easily ter-

minated. *See Rose v. Wells Fargo & Co.*, 902 F.2d 1417 (9th Cir. 1990) (merger of Wells Fargo and Crocker National banks displaced Crocker employees disproportionately).

[3] There were discharges from the former sales representatives of the Velsicol/V.S. Crop group as well as from the former Zoecon group. In the Velsicol group two discharged were over 40 and two were under 40. When the discharged employees of the old Zoecon group are added, there were seven discharged who were over 40 and four who were under 40. Obviously more persons over 40 than under 40 were terminated. The group of 11, however, is so small that it does not alone suffice to establish a statistical pattern that could conclusively be identified as discriminatory. Moreover, Shutt concedes that there was no discrimination against the former Velsicol/V.S. Crop group. The employment practice to which he objects he contends was directed only against the Zoecon group. The Zoecon group does not prove his case.

[4] In *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072 (9th Cir. 1986), we faced an analogous situation. In that case, Sengupta belonged to Department 222 within the Mining Group of the Morrison-Knudsen Co. *Id.* at 1073. Layoffs precipitated by the shale oil industry collapse hit Sengupta's department harder than the Mining Group as a whole. *Id.* at 1073-74. Sengupta claimed that the proper labor pool from which to draw statistical evidence of race discrimination was his department, consisting of 28 persons, rather than the Mining Group, consisting of 281 persons. *Id.* at 1074. We rejected that argument, stating:

> "Department 222 is too small. It had only 28 employees at the time of Sengupta's discharge .... The problem with small labor pools is that slight changes in the data can drastically alter appearances. Consequently, in 1979, the EEOC concluded that statistics from small applicant pools such as a pool

> of 30 persons are not dispositive. 44 Fed. Reg. 11,999 (1979).
>
> By necessity, courts sometimes must rely on statistics derived from small sample groups. Not to do so would deny employees in small companies some of the protections that Title VII provides. [Morrison-Knudsen] is not, however, a small company; nor is the Mining Group a small group. There exists no necessity to employ a small group." *Id.* at 1076.

We went on to say, "[w]hen the relevant statistical pool, the entire Mining Group, is considered, there is no disparate impact." *Id.* at 1077. So here, there existed no necessity to employ a small group. The relevant pool was 106 sales persons. When that pool is considered, no disparate impact has been shown. Shutt's case evaporates.

[5] Shutt also challenged Sandoz's termination decisions under the Washington law against age discrimination, Wash.Rev.Code Ann. § 49.60 *et seq.* In Washington, however, disparate impact analysis does not extend to subjective, discretionary employment practices. *Shannon v. Pay n' Save Corp.*, 104 Wash.2d 722, 709 P.2d 799, 806-07 (1985); *Oliver v. Pacific Northwest Bell Co.*, 106 Wash.2d 675, 724 P.2d 1003, 1006 (1986). Shutt therefore failed to state a claim of disparate impact age discrimination under Washington law.

The judgment is REVERSED and the case REMANDED with instructions that judgment be entered for the defendants.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

VINCENT F. SHUTT, Plaintiff, vs. SANDOZ CROP PROTECTION CORPORATION, a New York corporation, and ZOECON CORPORATION, Defendants.	)	No. C-87-166-AAM FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on for trial on March 27, 1989 before the Honorable Alan A. McDonald, sitting without a jury and the trial having concluded on March 30, 1989; the plaintiff appearing in person and by and through his counsel of record, John S. Moore and Richard R. Johnson; the defendants appearing by and through their counsel, Homer Crollard, Paul Cherner and Paul Bateman; and the court having heard and examined the evidence, both oral and

documentary, presented by the parties, and having rendered its oral decision herein on March 31, 1989, and being otherwise duly advised in the premises, does hereby make and enter, pursuant to Fed.R.Civ.P. 52(a) (1988), the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

All findings of fact identified by the court in its oral decision rendered March 31, 1989, are hereby incorporated by reference into this document as findings of fact in this decision.

II.

At all times material to this case, the plaintiff, Vincent F. Shutt, was and is a citizen of the State of Washington, residing at 8401 Hawthorn Drive, in the City of Yakima. The plaintiff has been married to Beverly

Shutt, who has resided with the plaintiff at all times material to this case.

III.

At all times material to this case, the defendant Sandoz Crop Protection Corporation (Sandoz) was and is a corporation organized and existing under the laws of the State of New York, with its principal place of business at Chicago, Illinois. At all times material to this case, the defendant Zoecon Corporation (Zoecon) was and is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Dallas, Texas.

IV.

The plaintiff was born at Santa Monica, California, on April 3, 1930.

V.

The plaintiff graduated from Santa Monica High School, Santa Monica, California, in

1948. His first significant employment was as a rancher manager for the Foster Cattle Company of Pine Valley, California. The plaintiff was employed with that company from October, 1949 until February, 1951.

VI.

The plaintiff left the employment of Foster Cattle Company in February, 1951, and served on active duty with that United States Army during the Korean conflict until February, 1953. The plaintiff received an honorable discharge from the United States Army.

VII.

The plaintiff attended California State Polytechnic College, San Luis Obispo, California, from 1953 through 1957. He received a Bachelor of Science degree from that institution in 1957, with a major in Soil Science and a minor in Animal Husbandry. His

college course work included soils and soils management, soil technology and fertility, fertilizers, orchard management, truck and forage crops, plant pathology and entomology. The plaintiff also successfully attended a course of applied entomology at Fresno State University, Fresno, California in 1971.

VIII.

From September 1957 to September 1972, the plaintiff was employed as a sales representative for the Agricultural Chemical Division of Shell Chemical Company. From 1957 to 1962, the plaintiff was responsible for the St. Louis District, with a sales territory including Missouri, Illinois and Indiana. From 1962 through 1967, the plaintiff was responsible for the Kansas City Sales District, with a sales area of Kansas, Nebraska, Colorado, Wyoming and Oklahoma. From 1967 through September 1972, the

plaintiff was responsible for the Fresno Sales District with a sales territory of five counties within the San Joaquin Valley of California.

IX.

From September, 1972 to January, 1980, the plaintiff was employed as a sales representative for the Agricultural Division of Rhone Poulenc, Inc. He worked from a home base in Boise, Idaho and covered the sales territory of Southern Idaho, Utah and Colorado.

X.

In January 1980, the plaintiff became employed by the Crop Protection Division of Sandoz, Inc., and established his home in Yakima, Washington. Initially, his sales territory included the states of Washington, Oregon, Idaho and Montana. In 1984, Sandoz, Inc. acquired Zoecon and the plaintiff became

employed by the Crop Protection Division of Zoecon. The plaintiff was continuously employed by the Crop Protection Division of Sandoz and/or Zoecon Corporation until July 15, 1986.

XI.

While employed in agricultural chemical sales from 1957 to 1986, the plaintiff had significant work experience in many areas of crop protection, working with such crops as corn, cotton, small grains, tree crops, alfalfa, forest products, turf, and in animal health and non-crop pest control for nurseries, greenhouses, landscape and turf applications. The plaintiff was also involved in the area of technical sales of chemical products, and was heavily involved in the formulation of marketing estimates for product movement and distribution, promotional

efforts, market development, and field testing and evaluation.

XII.

From 1957 through 1986, the plaintiff was a member of various organizations concerned with agricultural chemicals, pesticides and crop protection. The plaintiff was a member of the Colorado Agricultural Chemical Association, had served on its Board of Directors, and had served as its president in 1967. The plaintiff was also a member of the Idaho Agricultural Chemicals Association, had served on its Board of Directors for three years and served as its president in 1979 and 1980.

XIII.

At all times material to this matter, the plaintiff was licensed by the states of Washington, Oregon and Idaho as a pest control

consultant. He had also previously held a similar license with the State of California.

XIV.

At all times when the plaintiff was employed by the Crop Protection Division of Sandoz, Inc., and/or Zoecon, his direct supervisor was Mr. Robert Clayton, Western Regional Sales Manager. The National Sales Manager of the Crop Protection Division of Zoecon was Mr. Robert Lucas.

XV.

After the plaintiff was hired by Sandoz, Inc. in 1980, and while employed by Zoecon, he would receive periodic written and oral performance appraisals or evaluations from Mr. Clayton. All of the plaintiff's written performance appraisals indicated that his overall work performance for Sandoz, Inc. and/or Zoecon was acceptable, reflecting satisfactory work performance. The

plaintiff's last two performance appraisals were dated April 23, 1985 and January 16, 1986.

XVI.

When the plaintiff began his employment as a sales representative with Sandoz, Inc., his monthly base salary was $1,958.00 or $23,496.00 per year. In addition, the plaintiff received certain other employment benefits while employed with Sandoz, Inc., and/or Zoecon, including group medical and dental insurance coverage, long-term disability insurance coverage, accidental death and dismemberment coverage, a company sponsored thrift or savings plan/401K plan, paid vacation and sick leave, an incentive or bonus program, and the use of a company owned automobile.

XVII.

After the plaintiff was initially hired by Sandoz, and then while working for Zoecon, he received annual merit increases in his base salary of about five (5%) percent per year. On May 1, 1985, the plaintiff's annual salary was increased from $31,905.00 to $33,341.00. On May 1, 1986, the plaintiff received an annual merit salary increase from $33,341.00 to $34,941.00.

XVIII.

For the first six months of 1986, the plaintiff's sales of the various pesticide products for which he was responsible were in excess of the sales budgets and projections which had been assigned to him for his sales territory.

XIX.

At an annual national sales meeting of Zoecon Corporation Crop Protection Division

Sales Representatives in Phoenix, Arizona, held in November 1985, the plaintiff received an award for his outstanding sales efforts on behalf of the Chemical Manufacturing Division of Zoecon.

XX.

In October, 1984, the plaintiff was placed on 90-day probation. This action was taken because the plaintiff had been instructed to advise existing distributors of Solicam pesticide in the plaintiff's sales district that new distributors were being utilized for the same product. The plaintiff personally disagreed with this approach and did not follow the instructions that had been given to him. In February 1985, the plaintiff's job performance was again deemed satisfactory, and he was officially removed from probationary status.

XXI.

Prior to and during 1986, the Velsicol Chemical Corporation maintained a crop protection division and a national sales force for agricultural chemicals throughout the United States.

XXII.

Sometime during the spring of 1986, Sandoz, Inc., purchased the agribusiness of Velsicol Chemical Corporation. Following the sale to Sandoz, Inc., this agricutiness portion of Velsicol Chemical Corporation had the name V.S. Crop Protection Corporation. In May 1986, Sandoz, Inc. announced its intent to merge the Crop Protection Division of Zoecon with V.S. Crop Protection Corporation, effective June 2, 1986. The Crop Protection Division of Zoecon then became subject to the management of V.S. Crop Protection Corporation.

XXIII.

In February 1986, the northwest meeting of the Western Agricultural Chemicals Association was held at the Red Lion Inn-Riverside at Boise, Idaho. The plaintiff, Mr. Clayton, Mr. Lucas and Mr. Robert Bever, the Northwest District Sales Manager for the Agricultural Chemical Division of Velsicol Chemical Corporation were in attendance. During this meeting, the possibility that Sandoz, Inc. might acquire the Agricultural Chemical Division of Velsicol, an that Zoecon would then be merged with the Agricultural Chemical Division of Velsicol was discussed. In the course of these discussions, Mr. Bever told the plaintiff that should this merger occur, he thought Mr. Shutt would fit nicely into the new northwest territory sales team.

XXIV.

In the last week of April, 1986, the Western Region sales representatives of Zoecon were given an all-expenses paid three-day vacation at the Empress Hotel in Victoria, British Columbia, Canada, as a reward for winning a 1985 sales contest with the Eastern Region. The plaintiff and Mrs. Shutt were in attendance as well as Mr. Clayton, Mr.Lucas and other Zoecon Western Region sales representatives. At that time, there was further discussion concerning the possible merger of the Zoecon and Velsicol sales forces. At that time, Mr. Lucas, the National Sales Director for Zoecon, told the Zoecon western sales representatives that none of them need be concerned regarding sales representative jobs with the new company. Mr. Lucas also advised the Zoecon western sales representatives that they would all receive an interview in Chicago

for sales representative jobs with the new company.

XXV.

Between the last week of April 1986 and July 8, 1986, representatives of the new company, Sandoz Crop Protection Corporation, had no contact with the plaintiff. On July 8, 1986, the plaintiff received a telephone call from Mr. Ronald Dodson, the Western Regional Sales Manager for Sandoz, informing the plaintiff that he was to be discharged from employment effective July 15, 1986. At the time of his discharge, the plaintiff was 56 years of age.

XXVI.

At no time before the plaintiff's discharge was he contacted by anyone representing either of the defendants with regard to continued employment with Sandoz. The plaintiff was not given an interview of

any kind by either defendant, nor was the plaintiff ever offered any alternative form of employment.

XXVII.

At the time of the plaintiff's discharge from employment, the sales territory which the plaintiff had maintained for the Crop Protection Division of Zoecon was assumed by four sales representatives employed by Sandoz: 1) Mr. Patrick C. Bryan, dob: 9-17-45; 2) Mr. Mark J. Busch, dob: 11-22-51; 3) Mr. Paul D. Dick, dob: 6-12-56, and 4) Mr. James Scott Dyer, dob: 6-5-54. Messrs. Bryan, Busch, Dick and Dyer had each been employed for several years as sales representatives by the agri-business division of Velsicol Chemical Corporation, and then by V.S. Crop Protection Corporation. At the time of the plaintiff's discharge from employment, Mr. Bryan was 40 years of age, Mr. Busch was 34 years of age,

Mr. Dick was 30 years of age and Mr. Dyer was 32 years of age.

XXVIII.

After the plaintiff's discharge from employment, and up to the time of trial herein, the plaintiff has made application for employment with a number of business entities, both private and public, and both in and outside the City of Yakima and the State of Washington. The plaintiff has, on occasion, been able to find some short term agricultural consulting and other employment. However, by the time of trial, he had not been able to obtain suitable continuous employment. It is the desire of the plaintiff to continue to work as an agricultural chemical sales representative.

XXIX.

The plaintiff established through the testimony of Kent Seelig, C.P.A., and through

Exhibit 33, that the loss of earnings and benefits he sustained from the time of discharge herein, July 15, 1986, to March 31, 1989, assuming his continued employment as a sales representative with Sandoz had occurred to the time of trial, and after crediting the defendants for severance benefits paid the plaintiff as well as unemployment compensation benefits, as well as the amount of plaintiff's other earnings, was $88,961.00.

XXX.

Prior to the merger, meetings were held in Atlanta, Georgia, and in Lincolnshire and Chicago, Illinois to discuss which sales representatives in the predecessor companies would be retained or terminated. At no time during any of these meetings was the impact these plans would have on sales representatives age 40 and older ever discussed or evaluated. By May 12, 1986, Mr. Ronald Dodson

recommended to his superiors that employment guarantees with the new company be given to virtually every Velsicol/V.S. Crop Protection employee in the western region.

XXXI.

Sometime in early to mid-June, 1986, Ms. Barbara Sullivan, who was the affirmative action officer for Sandoz, was asked by her supervisor, Mr. Douglas Schimmel, the Director of Human Resources for Sandoz, to conduct an affirmative action audit of the proposed reorganized sales force. Among the information that Ms. Sullivan received was a copy of defendant's Exhibit No. 130, a memo outlining, inter alia, proposed sales representative terminations. At and before the time of the plaintiff's discharge, Ms. Sullivan was aware and cognizant of the provisions of the Age Discrimination In Employment Act (ADEA), 29 U.S.C. §621, et seq., and of the fact that

many states also had laws prohibiting discrimination in employment based on age. Ms. Sullivan was also aware and cognizant of both the "disparate treatment" and "disparate impact" legal theories of age discrimination in employment. Ms. Sullivan had obtained a law degree and was admitted to the Illinois Bar in 1985. Prior to obtaining her position as the affirmative action officer for Sandoz, Ms. Sullivan had held the same position for Velsicol Chemical corporation and for V.S. Crop Protection.

XXXII.

Sometime after receiving defendant's Exhibit No. 130, Ms. Sullivan telephoned Mr. Craig Damtrom, then Sandoz' National Sales Manager, and told him she wanted to review this memo with him. Mr. Damstrom also was aware and cognizant of the provisions of the ADEA and related state acts. The two met

either sometime that afternoon or the next morning. Mr. Damstrom explained to Ms. Sullivan what the new sales organization would look like, and what events had transpired leading up to the formulation of defendant's Exhibit No. 130.

XXXIII.

Sometime during mid-June, 1986, following her meeting with Mr. Damstrom, Ms. Sullivan met with Messrs. Damstrom, Dodson, and James Oliver, the Eastern Regional Sales Manager for Sandoz. This meeting lasted approximately 45 minutes. In mid-May 1986, Ms. Sullivan had made a request to the personnel office of Zoecon to send the personnel files of all Zoecon sales representatives to her in Chicago. None of those personnel files had arrived in Chicago by the time of the mid-June meeting. Ms. Sullivan did not review any Zoecon sales representatives personnel files

before she approved implementation of the reorganizational plan and termination of sales representatives, including plaintiff in late June, 1986. Ms. Sullivan did, however, have in her possession a copy of the defendants' Exhibit No. 104, which she was advised was a force rank of Zoecon sales representatives. That document also set forth the sex, minority status, date of birth, and age in May 1986, of each Zoecon sales representative, including the plaintiff.

XXXIV.

After the meeting with Messrs. Damstrom, Dodson and Oliver, ms. Sullivan met with Mr. Dodson alone for about an hour to discuss western regional sales force terminations. The purpose of the meeting was to decide if it was alright to proceed with the terminations outlined in Defendants' Exhibit No. 130. There was a specific discussion at this

meeting regarding the plaintiff, and why it was recommended he be terminated. She learned the plaintiff was not identified as a "high performer" in the Zoecon force rank, or by the customers which mr. Bever had contacted. Mr. Dodson also discussed the western region business plan with Ms. Sullivan as well as the company's product mix. Ms. Sullivan was advised that Messrs. Dick, Busch, Bryan, and Dyer would be retained by the new company in the northwest sales territory. She was generally familiar with the age of each of these four men, and that all were younger than the plaintiff. She had previously reviewed Velsicol annual performance appraisals for each of the four men, and knew generally about their level of performance. Ms. Sullivan was advised that the objective of the sales force was to get "high performers" as sales representatives in the new company. Ms. Sullivan

also reviewed the terminations of certain V.S. Crop Protection sales representatives.

XXXV.

Ms. Sullivan did not have any knowledge of the results of annual appraisals of the plaintiff by Sandoz or Zoecon. She did not know how Zoecon sales representatives compared with Velsicol sales representatives in terms of performance. Ms. Sullivan knew that roughly 60% of the Velsicol/V.S. Crop Protection sales representatives received annual appraisals which resulted in a rating of 3, or satisfactory performance. Approximately 75 former Velsicol/V.S. Crop Protection employees were given jobs with the new company.

XXXVI.

At the time of the plaintiff's discharge, Sandoz had no written policy concerning how it was to abide by laws against age discrimina-

tion. No criteria had been established by Sandoz to prevent age discrimination in the termination process which resulted from the merger of the two companies.

XXXVII.

Ms. Sullivan's decision that it was appropriate to approve the terminations outlined in Exhibit No. 130 was arrived at after several discussion of the business decisions involved in formulating the reorganization plan, after reviewing the overall work force as to who would be kept and who would be discharged, and after considering the ages of those sales representatives terminated versus those retained. She concluded that age was not a determinative factor with regard to the reorganization of the sales force in terms of what sales representatives were retained or which ones were terminated.

XXXVIII.

According to Ms. Sullivan's review of the proposed terminations, about 50% of the sales representatives from V.S. Crop protection Company who were terminated were over 40 years of age, and about 50% were under that age. Of the Zoecon sales representatives terminated, Ms. Sullivan knew that a greater percentage of people over age 40 were being terminated than were being terminated from V.S. Crop. Ms. Sullivan also knew, before allowing the termination of the Zoecon sales representatives, that six of the seven people being terminated were over age 40. Ms. Sullivan was concerned about that disparity. She was also aware that only about 2.4% of all V.S. or Velsicol sales representatives who were discharged were over age 40 when terminated. Because of her concern, Ms. Sullivan went back to review the information to ensure that

termination decisions were not being made on the basis of age.

XXXIX.

The defendants have maintained and produced testimony at trial, that the plaintiff's discharge was not on the basis of age discrimination, but rather, came about after an evaluation of plaintiff's overall performance and comparison with other competing sales representatives. Specifically, this testimony attempted to show that: 1) a review of plaintiff's overall performance by his immediate supervisor, Mr. Clayton, and then by Mr. Lucas, did not compare favorably to a review of overall performance by V.S.Crop Protection sales representatives; 2) Mr. Robert Bever, a V.S. Crop Protection/Sandoz District Sales Manager, informally contacted two distributors of Agricultural Chemicals in Oregon, whose reac-

tion to Mr. Bever indicated they did not hold the plaintiff in "high regard"; 3) although Mr. Shutt's sales performance was impressive, a degree of his success was a result of a unique technical fit of Zoecon's products in the market place; and 4) Sandoz wished to keep a "dicamba" oriented sale force, and had a proven team of high performance sales representatives to the northwest.

The defendants' witnesses maintained that the decision to terminate the plaintiff's employment was based upon his low performance, his lack of dicamba sales background and experience, and that his age was not a matter of consideration. The defendant maintains that sales representatives under the age of 40 years also lost their jobs at the time of the merger of the two companies.

XL.

The defendant maintains that defendants' Exhibit No. 127, a force ranking of all Zoecon sales representatives, was prepared by Mr. Clayton, Mr. Lucas and Zoecon Eastern Region Sales Manager, Bob Bergstrom. The defendants maintain that this ranking was compiled on the basis of overall performance, and that it was utilized to determine which sales representatives from Zoecon would be retained and which might be discharged. The defendants maintain that the plaintiff was ranked seventh out of eight among sales representatives in the western region by his own people, and that this was a significant factor in deciding to discharge him. Mr. Clayton testified he knew absolutely nothing about a 1986 Zoecon western region sales representative force rank.

XLI.

In the western region of Zoecon, the lowest four of the eight ranked sales representatives, Kin Whittington, Andrew White, the plaintiff and Michael Svoboda were all within the protected age group of the ADEA and, according to plaintiff's Exhibit No. 25, were all discharged by Sandoz. Of the four Zoecon western region sales representatives retained by Sandoz, all except Richard Smith were less than ~~age~~ 40 at the time of the plaintiff's discharge.

XLII.

Some of the Zoecon sales representatives that were identified as "high performers" were classified by Sandoz as "transition employees". "Transition employees" were those individuals which the defendant were interested in retaining, but for which

currently there was no sales representative position in which to place them.

Mr. Mike Svoboda, who was ranked eighth out of eight in the Zoecon western region, according to defendants' Exhibit No. 127, was identified as a "transition employee", and was offered a sales territory in Minnesota. On September 30, 1986, Mr. Svoboda was terminated, according to plaintiff's Exhibit No. 25. The plaintiff was never identified as a transition employee, despite being ranked higher than Mr. Svoboda in the Zoecon western region force rank. The defendants offered no explanation why Mr. Svoboda would be identified as a "higher performer"/"transition employee", whereas the plaintiff was not.

XLIII.

With regard to defendants' Exhibit No. 127 and plaintiff's Exhibit 18, the court finds in Zoecon's eastern region 13 sales

representatives that were listed and three that were discharged. Of the 10 Zoecon eastern sales representatives retained, only three, Joseph Stickle, Al Fuchs and Bob Jones, were within the protected age group of the ADEA. The seven other Zoecon eastern sales representatives who were retained were all less than 40 years of age. Of the three Zoecon eastern sales representatives who were discharged, two, Richard Schneider and Walt McDonald, wee within the protected age group. The other discharged eastern employee, Andrew Seckenger, was less than age 40.

In the eastern region, the lowest rated sales representative, according to defendants' Exhibit No. 127, was Larry Barefoot who was employed by Sandoz at the time of the plaintiff's discharge. At that time, Mr. Barefoot was less than 40 years of age. The eleventh rated sales representative, Mr. Bill

Ray, was also retained and his age was also less than 40 years. The defendants offered no testimony why Mr. Ray and Mr. Barefoot were retained in light of the stated goal of Sandoz to retain only high performers.

XLIV.

Plaintiff's Exhibit No. 18 establishes that the average age of the Zoecon sales representatives who were retained by Sandoz was 40.7 years. The average age of sales representatives who were terminated was 54.4 years. Of the 21 Zoecon sales representatives, 11 were age 40 and older on May 1, 1986. Only one was terminated, or 10%. Of the seven Zoecon sales representatives who were discharged, six were over age 40, or 85%.

XLV.

On May 1, 1986, the average age for the regional director and the six district managers for the western sales region of

Sandoz was 33.9 years. The average age on May 1, 1986, of all western region sales representatives was 33.8 years. The average age on May 1, 1986, of Sandoz' Western I district manager and sales representatives was 35.6. The Western I district included the territory the plaintiff had as a sales representative for Zoecon.

XLVI.

As of May 1, 1986, the average age for all sales representatives for Sandoz in its eastern sales region was 35.7 years. The average age on May 1, 1986, for the eastern region manager and all district managers, not including District VI, was 38.2 years.

On May 1, 1986, the average age of all Sandoz sales representatives in the eastern and western regions combined was 34.7 years. On May 1, 1986, the average age of the eastern and western regional directors and district

managers, not including District VI, was 35.9 years.

XLVII.

Sometime during the spring of 1986, Mr. Bever was asked by Mr. Dodson to informally contact common distributors in plaintiff's sales territory as to their opinion of the plaintiff, which he did. Mr. Bever contacted two individuals in the Portland, Oregon regional office of Wilbur Ellis Company, Mr. John Nunnmaker and Mr. Mark Hansen. He also contacted two individuals in the Salem, Oregon office of Northwest Chemicals, Mr. Burt Eddins and Mr. Terry Bahne. None of these people gave the plaintiff a strong recommendation or held him in "high regard". Mr. Bever contacted no other distributors or customers familiar with the plaintiff. None of the individuals named above had more than occasional contact with the plaintiff, and

none had any direct contact with the plaintiff during the three years just prior to his discharge.

XLVIII.

Sandoz continued to market a pesticide called Banvel, which had been a Velsicol product for many years, after the merger. This pesticide accounted for a high volume of sales in the Pacific Northwest, and is classified as a "dicamba". Sandoz was interested in keeping a strong dicamba sales force in the northwest. The plaintiff had, for many years, worked with pesticides similar to and including Banvel, although he never worked for a company which sold Banvel directly. At no time did the defendants inquire of the plaintiff as to his experience with dicamba or dicamba-type products.

XLIX.

After the plaintiff was discharged, he suffered from objective symptoms of depression, anxiety, tension and general loss of self-esteem. He consulted with his family physician, George Garfein, M.D., of Yakima, Washington, for treatment of these symptoms. Dr. Garfein prescribed Valium for the plaintiff. He continued to take the Valium for relief of these symptoms on a regular basis up to the time of trial. Following his discharge from employment, plaintiff's anxiety and tension also resulted in a grinding of his teeth, causing him to have objective dental symptoms for which he consulted a Yakima dental practitioner for treatment.

The court having heretofore made and entered its Findings of Fact, does now make the following:

CONCLUSIONS OF LAW

I.

All conclusions of law stated by the court in its oral decision rendered March 31, 1989, are hereby incorporated by reference into this document as conclusions of law in this decision.

II.

The court has personal jurisdiction over the parties hereto, and the subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1332. This court also has pendent jurisdiction over the plaintiff's state law claims, arising under R.C.W. 49.60, the Washington Law Against Discrimination, pursuant to 28 U.S.C. § 1441.

III.

The plaintiff was involuntarily discharged from employment by the defendants on July 15, 1986.

IV.

At the time of the plaintiff's discharge from employment by the defendants, he was within the protected age group of both 29 U.S.C. § 621, et seq., the Age Discrimination in Employment Act, and R.C.W. 49.60.180, the Washington law against discrimination.

V.

At the time of the plaintiff's discharge by the defendants, his work performance was more than satisfactory. The plaintiff was and is well qualified for employment by Sandoz as an agricultural chemical sales representative in the northwest United States.

VI.

At the time of the plaintiff's discharge by the defendants, he was replaced in his sales territory and job position by four former Velsicol/V.S. Crop Protection sales representatives employed by Sandoz, all of whom are younger than the plaintiff, the oldest of the four at that time being age 40.

VII.

The manner in which the structure of the new company's sales organization was decided, and the practices used by the defendants in selecting which individual sales representatives from Velsicol/V.S.Crop Protection and Zoecon would be retained or terminated, although facially neutral in appearance, had a harsh, disparate and discriminatory impact upon Zoecon sales representatives age 40 and over, including the plaintiff.

The statistical evidence in this regard is compelling, and no reasonable trier of fact

could ignore it. It is apparent from the evidence that there was a youth movement within the new company. The plaintiff clearly established a prima facie case of disparate impact age discrimination.

VIII.

The burden of coming forward with evidence then shifted to the defendants to demonstrate that the methods and practices used had a manifest relationship to the employment. The defendants assert that their decisions were based on the force rank provided by Mr. Lucas, on customer reactions provided by Mr. Bever, and on a company desire to retain sales representatives with strong dicamba sales experience.

The court concludes that the plaintiff is and was fully capable and qualified to sell dicamba herbicides for the new company. The

court is totally unimpressed with the customer reaction evidence.

The force rank provided by Mr. Lucas was applied so inconsistently with regard to the plaintiff, especially regarding Mr. Svoboda, Mr. Barefoot and Mr. Ray, that the court concludes that it provides no justification for the adverse and disparate impact upon Zoecon sales representatives age 40 and over. Without the force rank, the court is left with no evidence before it to establish any justification on the part of the defendants to explain this adverse and disparate impact, especially since the personnel files of the Zoecon representatives were never reviewed by the defendants prior to the termination of the plaintiff and other Zoecon sales representatives. The evidence offered by the defendants of the practices utilized in decision to terminate the plaintiff and other Zoecon

representatives was mere pretext or disguise for discrimination.

IX.

The plaintiff sustained his burden of proving that the employment practices utilized by the defendants in carrying out the merger of the sales forces of the two companies had a significant, discriminatory and disparate impact on those individuals age 40 and over, including the plaintiff, and constituted a violation of the Age Discrimination in Employment Act and the Washington state laws against discrimination on the basis of age.

X.

The defendants' violations of federal and state anti-discrimination laws directly and proximately caused the plaintiff actual damages from July 15, 1986 through March 31, 1989. The court finds that the plaintiff's actual damages totalled $88,961.00 and that

these damages are appropriate and reasonable in amount and will not be reduced y the defendants' affirmative defense of lack of mitigation.

XI.

The plaintiff is entitled to recover pre-judgment interest against the defendants on the principai amount of his actual damages, $88,961.00, at the rate of 13.04% per annum, between July 15, 1986 and March 31, 1989, in the amount of $31,418.05. This interest rate was calculated based upon the formula described in R.C.W. 19.52.020(1).

XII.

The court finds the defendants' violation of the ADEA and the Washington state law against discrimination to be "willful" for purposes of these Acts. the manner in which the new company's sales organization was formed and the employment practices used to

decide which sales representatives would be retained or terminated reflected the intent by the defendants to have a youthful sales organization in violation of the law.

The review of the defendant's procedures and practices, the recommended sales organization, and the recommended terminations and retentions by the defendants' affirmative action officer, Ms. Sullivan, did not lessen the disparate and discriminatory impact on the protected group, nor did it make the defendants' violation of the law any less willful. Ms. Sullivan knew the ages of those being terminated and retained, and was concerned that 85% of the Zoecon sales representatives age 40 and over were being terminated. Yet she approved the proposed retentions and terminations and, therefore, condoned the variance from, and totally inconsistent application of, the Zoecon force rank provided

by Mr. Lucas. The defendants' violation of ADEA and the Washington law again discrimination was willful, and was in reckless disregard of the law.

XIII.

Due to the willful nature of the violation of the law, the plaintiff is entitled to recover liquidated damages against the defendants in the amount of $88,961.00 which is equal to the amount of plaintiff's actual damages.

XIV.

The plaintiff is entitled to recover money damages against the defendants for his emotional distress caused by the defendants' intentional and discriminatory termination of his employment under Washington state law, based upon Cagle v. Burns & Rowe, Inc., 106 Wash.2d 911, 726 P.2d 434 (1986). The court finds that the defendants' wrongful termina-

tion of the plaintiff's employment was intentional in that the defendants intended the act that resulted in the plaintiff's emotional distress. The plaintiff's evidence established objective symptoms of emotional distress, and the court finds that the sum of $20,000.00 is an appropriate and reasonable amount to award the plaintiff for his emotional distress damages.

XV.

The plaintiff is the prevailing party herein and as such he is entitled to recover his reasonable attorneys' fees against the defendants pursuant to federal and state statutes. The court finds that the amount of $83,437.00 is a reasonable sum to allow the plaintiff as attorneys' fees. The court relies on the authority of National Wildlife Federation v. FERC, No. 84-7325 (9th Cir. 1989) and Allard v. First Interstate Bank, 112

Wash.2d 141, ___ P.2d ___ (1989), as well as the information in the record provided by counsel, as its basis for computing this figure.

XVI.

The plaintiff is also entitled to recover his taxable costs and disbursements incurred herein in the amount of $1,753.60.

XVII.

The court has concluded that the appropriate remedy for "front pay" damages is not an award of money damages. Rather, the court concludes that the plaintiff wants to continue to work as an agricultural chemical sales representative, and that he should continue to do so. Accordingly, the court orders the defendants to reinstate the plaintiff as an agricultural chemical sales representative in the sales territory to which he was assigned at the time of his discharge

within 60 days of the date of entry of this judgment. The plaintiff shall be reinstated as an employee with full benefits and at the same salary level he was at on July 15, 1986, augmented by all intervening, normal salary increases.

XVIII.

At the time of discharge, the plaintiff was an employee of Zoecon Corporation. He was discharged by an agent of Sandoz Corp Protection. Zoecon was merged with V.S. Crop Protection Corporation to form Sandoz Crop Protection Corporation. At the time of plaintiff's discharge, both defendant corporation were owned by Sandoz, Limited. Accordingly, the liability of the defendants to the plaintiff herein is joint and several.

DONE BY THE COURT this ___ day of May, 1989.

/s/
ALAN A. McDONALD
United States District Judge

March 31, 1989
11:00 A.M.

THE COURT: Before ruling, the Court wants to extend its expression of appreciation to Counsel on each side for a very well-prepared and excellent presentation of a matter that has its complexities and also for the courtesy with which you have treated one another in a matter which oftentimes inspires emotion.

Before the Court for resolution is the claim of the plaintiff, Vincent Shutt, for relief under federal and state laws from which he asserts was a wrongful termination of his employment, which he claims occurred in mid-1986 in July. This was when the company for which plaintiff had worked for about eight years was merged with the defendant or its immediate predecessor in a corporate

development, the history of which is well reflected in the record.

Before addressing the issues raised in that fashion, some preliminary observations are in point. The Court sits in this matter because it's tried to the bench, not only as the arbiter of the law but as the trier of fact. In the latter capacity, it is constrained to act just as it would instruct a jury to do in a similar case. It must follow the law, whether it agrees with it philosophically or not.

The Court must ultimately decide all issues of credibility, and in doing so, employ those familiar tenets for that task: The reasonableness of the testimony, the reasonableness of it in relation to other testimony, the appearance and demeanor of witnesses on the stand; all of those aids that are usually employed in assessing what is a vital issue of

credibility. Further, the Court's performance as the trier of fact is not to be influenced by sympathy on the one hand or prejudice on the other. Finally, in those areas it should be assumed that the Court resolved all issues of weight and credibility consistently with its findings of fact.

The history of Mr. Shutt's employment and the circumstances related to the merger of what I will refer to as two companies and the method of selection involved in the eventual reduction of force, as it has been described, is also documented in detail in the record. So a great deal of reiteration is not necessary.

In synopsis, plaintiff, Mr. Shutt, with a wide and varied background in agchemistry, and after considerable experience with other vendors of those products employed in the agricultural economy, was positioned

with the corporate predecessor to Zoecon in 1980. He served this company, as demonstrated in his personnel records and by sales records, as well, in a way that was satisfactory, to say the very least.

Living in Yakima, plaintiff had responsibility first, for four Northwestern states, and later three plus a portion of Oregon. In this area he dealt with distributors, dealers and a variety of products and involved himself in those activities common to his calling. In that regard, the record should reflect that those of us who live here in this highly intensive and varied agricultural valley that produces 60 major crops each year and who have either been involved in farming, are involved in farming, or along with those that practice agricultural law, have a fair idea of what people in this

particular profession are called up to do as a part of their responsibilities.

In the spring of 1986--at just what point in time we're not advised, but at least it was apparently in or around April--Sandoz Corporation, which owned Zoecon Corporation, purchased the agri-business of Velsicol Chemical Corporation; and following the sale to Sandoz, this agri-business portion of Velsicol Chemical Corporation had the name of VS Crop Protection Corporation.

Then in May of 1986 Sandoz Corporation--and it might have been before that when it made its decision--announced its intention to merge the crop protection division of Zoecon Corporation with VS Crop Protection Corporation, effective June 2nd, 1988. The Crop Protection Division of Zoecon Corporation became subject to the management of VS Crop Protection Corporation.

The rumors of the pending merger abounded, and there was, I suppose, that natural concern about how it would impact personnel in both companies and their position with the new company. Two meetings occurred involving the sales personnel at the upper echelon of the two companies--one of them in late April, perhaps the 1st of May, in Atlanta, and one within two weeks thereafter in Chicago.

In the first meeting, which has been described as sort of a "get-to-know-one-another" session, it was mutually agreed that at the next meeting each of the representative people from each company would come to Chicago--to Lincolnshire--with a program or their proposal as to the direction and formation that the revised or realigned new company--the merged company--would take. So at that meeting, it appeared that the only

game plan produced was the one from the organization that had been Velsicol and the VS Crop Protection Corporation. Again, that is perfectly natural in light of the disparity in the respective size of each organization.

In any event, while Mr. Lucas appeared with his Eastern and Western Regional Managers, the program obviously was in the hands of the larger group. The restructuring of it, again for obvious and valid reasons, was to be ultimately undertaken by Mr. Damstrom. Actually, he had already been in the process of that, indicating to us that he had engaged prior to that meeting in alliance with his regional managers in working out a program and in force rating his own existing personnel to determine where they would fit into the new sales profile.

At the end of that meeting, if he hadn't been asked to already, Mr. Lucas was

asked to undertake a forced rating of his personnel in the Eastern and Western Regions. He informs us that, in effect, he passed that responsibility along to the people in his organization in the East and West for their input and actual initial classification, feeling that since they were involved on a daily basis with these people, they were in the best position to undertake that task.

It's interesting that the evidence in that regard is far from satisfactory. Mr. Clayton, who was the Western Regional Manager for Mr. Shutt's employer and who in essence was the real supervisor of Mr. Shutt, denies that entirely. He says in his deposition that he doesn't recall being involved in that process at all. Interestingly, at his deposition there was physically present what is in evidence in this case as Exhibit 17, and he was not given any opportunity, really, to

refresh his memory from it, simply because he said he had never seen the document before until he was shown a copy of it by Counsel for the defendant some weeks or months before his deposition.

In any event, it's Mr. Lucas's contention he at least generally agreed with this forced ranking and turned it over to someone in the larger organization. The ranking that's referred to in that list, however it was developed, purported to number the sales representatives in each region; and in the Western Region where Mr. Shutt was employed, the ratings were one to eight, and Mr. Shutt was ranked seventh in that order. Again, Mr. Lucas indicated that he agreed with that ranking and passed it along to someone in the Velsicol organization, as the Court had indicated.

An interesting and pertinent part of that whole process is that we've never been furnished with any idea of what the ranking was based upon. It was apparently subjective. We hope that it had something to do with a review of the pertinent work assessments and performances. We hope that it had nothing to do with age of people involved, but we don't know that. We are uninformed concerning that.

I gather Mr. Lucas couldn't tell us because he really was only superficially involved, and Mr. Clayton denies that he was involved in the process at all. This was hardly a good foundation for assessing that particular document.

In the realignment eventually determined by the defendant and the eventual reduction in force which followed, the vast majority of available positions in the sales staff, Eastern and Western, went to the

defendants' employees--and I am referring to the defendants, realizing that while this was going on, they were in a little different corporate posture; that is, until the merger was finally accomplished. So those positions which in effect were filled for all practical purposes, in larger part were accomplished by about the 12th of May, as the Court recalls, and that was on the basis that these were a "proven team," "top performers," and that--well, first of all, they were familiar with the company's major product line, the Dicamba line, Banvel and its progeny--and that management was "comfortable" with them.

Defendants explain that in assessing the inclusion of the sales representatives from Zoecon, it again simply asserted that the review was for "top performers"; that time constraints and difficulty in obtaining personnel records precluded any in-depth

review and that they relied essentially upon the forced ranking provided by Mr. Lucas.

As a result of the merger which was accomplished by June the 2nd, either three or four of the eight sales representatives in the West were discharged or scheduled for termination, as were three of the thirteen in the East.

Mr. Shutt, having previously been assured that he would receive an interview and being told that he would fit nicely into this team, was in fact awaiting an interview when he was advised in July, in a manner that any of us would regard--and I think everyone agrees was unfortunate--that he was one of those selected for termination. He immediately protested, to no avail, in a letter in which he reviewed his sales record and history with the company. This was

followed by his damage claim as outlined in Exhibit 32, as amended in Exhibit 36.

Some review of the law on discrimination in employment is appropriate. We must always begin with the understanding that this is a society where economic free reign has been the tradition in history; that generally people who are employed without a contract of employment guaranteeing them a specified period of time--or unless they're Federal Judges, who are guaranteed security in another fashion--work at the will of their employers. There are some exceptions in that legal tenet, but none of them are applicable here; and that means that an employee can be terminated and it is not required that cause be established. So oftentimes that position results in situations which are extremely difficult for people who suddenly find themselves unemployed.

That's not the concern of the Federal law or its very similar state law--copies--which address the matter of discrimination. Those forbid and prohibit conduct or discharge, or anything involved in the employment condition--the employment relationship--certainly including termination--on five forbidden criteria: race, color, religion and qualification for employment is not affected by this title. It is important to appreciate that the legislation was not intended to place the courts in a position of being social workers or to effect socially desirable goals.

The law is specific that, "Whatever its merits as a socially desirable objective," Title VII would not require--and no Court could read Title VII as requiring--an employer to lower or change the occupational qualifications he sets for his employees simply because

"proportionately"--in the citation I'm reading from--"fewer Negroes than whites are able to meet them." Then it goes on to say that: "Title VII says merely that a covered employer cannot refuse to hire someone simply because of his color." Then it goes on again to say: "By enacting Title VII, 'discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.'" It cautions us that "Congress was concerned about preserving employer freedom"---and intended "as little intrusion into the free enterprise system as possible."

Now, in cases of this kind there are two avenues for which the question of discrimination of any protected class are obliged to follow. The types of discrimination recognized in the law are two-fold; and in the cases setting those forth, the proce-

dures which the parties are obliged to pursue, which the Court must assess by, are developed. It involves sort of a three-pronged, shifting burden--sort of a bouncing ball--and it goes something like this--addressing first of all the matter of discrimination and discrimination by disparate treatment--"The employee first has the burden of establishing a prima facie case of age discrimination. He must show: (1) he was in the protected class; (2) he was doing his job well enough to meet his employer's legitimate expectations; (3) in spite of his performance, he was discharged; and (4) the employee sought a replacement for him. If the plaintiff satisfies this burden, a presumption of discrimination is raised, and the defendant employer next has the burden of producing evidence of some legitimate reason for the plaintiff's termination and must articulate it."

Then, if the plaintiff meets this burden--which is essentially a burden of going forward--the presumption is no longer considered, and the plaintiff then must show, by a preponderance of the evidence, that the defendant's proffered reasons are merely pretextual. The plaintiff may prevail in one of two ways: He may either directly persuade the trier of fact that the defendant was more likely motivated by a discriminatory reason than a legitimate one in firing him, or he may indirectly demonstrate that the defendant's proffered reason for the termination is not credible.

The other form of discrimination which the law recognizes and permits to be established, if the evidence supports it, is discrimination resulting from disparate impact. A plaintiff can recover if he can show disparate treatment; that he suffered

discrimination in employment by reasons of practices which in fact treated more harshly employees in the protected age group. Now, while a precise description of the respective burdens of production to be followed in a disparate impact case is not entirely clear, some formula is found in the law and in this Circuit in the case of Sakellar v. Lockheed, which is reported in 765 F.2d 1453, with certiorari denied by the Supreme Court in 1986. Quoting from that instruction:

> "To establish a prima facie case of disparate impact, a plaintiff must show that a neutral practice had a significant discriminatory impact upon a protected class. Once such a showing is made, the burden shifts to the employer to demonstrate that the practice has a manifest relationship to employment. A

plaintiff may still prevail upon a showing that the practice was a mere pretext for discrimination."

Now, in that process, in that profile, as the appellate courts like to describe these approaches, it is clear that "competent statistical evidence is sufficient to meet the burden." The Court take note that because prejudice is rarely admitted, except, perhaps, in a confessional booth or in a locker room "statistical evidence usually provides the only rational means of determining whether a facially neutral employment practice has a discriminatory impact." So the Courts of the Ninth Circuit, of the country and this state, recognize that: "The primary means of proving a substantial disproportionate impact on a protected class is through the use of statistical evidence." Recognizing that it can be employed to establish the plaintiff's initial

case, the Court in Griggs v. Duke Power Co. indicated: "Not only overt discrimination but also practices that are fair in form, but discriminatory in operation, are proscribed. The touchstone is business necessity. If an employment practice which operates to exclude a protected class cannot be shown to be related to job performance, the practice is prohibited."

On the subject of the use of the statistics, the law is also instructive. It is recognized that statistical evidence is also of central importance in a disparate treatment case, and may be used to show both motive and a pattern of practice of racial discrimination, and in a proper case we may infer discrimination if gross statistical disparities can be shown; and when the statistical showing is sufficient the plaintiff's case can be made with nothing else.

However, the Court is cautioned--the trier of fact in any case is cautioned that because of the significant role that statistics can play in a discrimination case and because of their inherently slippery nature, it is imperative that they be used properly and that they're not irrefutable--they come in infinite variety, and like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

Interestingly, in the state of Washington in the guidelines developed for the Equal Employment Opportunity Commission, there is a standard which is referred to as the four-fifths rule, where, in effect, you're entitled to presume discrimination where you have that kind of statistical evidence. The Supreme Court of the State of Washington in Shannon v. Pay 'N Save Corp., 104 W.2d,

refused to be bound either way by that presumption. They reversed on the basis of its inclusion within an instruction and said that the right of trial entitled every party to the judgment of the trier of fact as to the ultimate facts upon which liability rests, and it is essential that the trier of fact be left perfectly free to form and declare from the evidence his opinion upon those questions of fact.

Finally, another observation seems appropriate. Lawyers and judges are used to finding comfort in precedent and in cases, and in these disputes--the cases of discrimination--they're really of very little help, and that is because the cases are so fact-intensive. Vary the facts and you vary the theory. Vary the facts, and you vary, for instance, the role of the statistics; and the case law reflects this. The models which everyone

begins with soon begin to blur, and they blur because of the difference in facts, and that is not meant as a criticism. It recites a reality which appropriately reflects a needed flexibility in the law to deal with the facts as they vary.

This case is a splendid example. This wasn't a typical reduction in force case where a company, due to economic reasons or some other significant cause, had to cut back on an existing single work force, all of whom had an employment record which this reducing company could review and assess. It was, in fact, merging two groups with the responsibility for deciding who stayed and who went vested in one group which knew next to nothing about the other; and that undertaking in that circumstance adds in this Court's mind ramifications which are different from any

facts which I can find in the appellate records; and you can be assured I have looked.

The process, for reasons which were really never fully explained, was being hurried. There was a time compression, and when one thinks about the decisions which were made in about a period of two months maximum, you have to appreciate that that compression skewed normal processes. It affected both decisions and results, and in a manner crucial to a determination of the real issue: Whether the plaintiff's age was a factor, a material consideration in the decision to keep him or to terminate him.

When Mr. Damstrom, with the responsibility he had, set about to accomplish this reorganization in the time he had, he began, it seems to the Court, with an entirely appropriate business judgment. One can well understand his comfort zone with people he knew and

trusted--his interest in people with experience with his major line which produced a substantial portion of the company's income and was expected to do so in the new company--and certainly the geographic profile of the new company--which would be almost identical to the one in which he headed the sales force.

All of those are valid business concerns. At the very least, they are matters that are not any of this Court's business. The law is clear, again, that that determination was for him; and certainly, as he understood them, they would appear to be facially fair and nondiscriminatory. Even his criteria, if it can be called that--"Top performers"--about as subjective a term as you could produce, except for, perhaps, "good lawyer"--would probably have been totally appropriate if it affected only the employees of his own company. These people, presumably

because of the relationship one with the other and their history of being together, and so on--his lieutenants and the people under them--would understand that term and what it meant, and could identify those who met it. However, he wasn't involved with just his own company; he was involved, perhaps by default, but nonetheless with another company.

So when his program with the people from his company was in place, it had to be obvious to anyone that the number of jobs available to the smaller company in proportion to the number of people in the smaller company to fill those jobs was effectively reduced, just by his initial criteria. They weren't people that he knew, that he trusted. They weren't people who were familiar with Banvel sales, except, perhaps, in a general way. So when he narrowed the availability, the mix of jobs to people, by what would be legitimate

business choices, it seems clear to the Court that he was in a position where the definition of "Top performers"--the selection of "Top performers" from the small group must be the group against which impact must be assessed.

If the Court's reasoning is sound in that regard, the statistics are rather compelling. The Court notes that in the Western Region of Zoecon, the lowest four of the eight ranked representatives--if you include Svoboda--Ken Whittington, Andrew White, the plaintiff and Svoboda were all within the protected age group of the ADEA and were all discharged by the defendant; and of the four retained from the Western District, all except Richard Smith were less than 40 years old at the time of the plaintiff's discharge.

In the Eastern Region of sales representatives of Zoecon Corporation, 13 sales representatives are listed and three

were discharged. Of the ten sales representatives retained, only one--Joseph Stickle--was within the protected age group of the ADEA. The nine other Zoecon Corporation sales representatives who were retained were all less than 40 years of age. Of the three Zoecon Corporation Eastern sales representatives who were discharged, two--Snyder and McDonald--were within the protected age group. The other discharged Eastern employee, Andy Seckinger, was less than age 40. In the Eastern Region, the lowest-rated sales representative was Larry Barefoot; that's according to Exhibits 18 and 104. At the time of plaintiff's discharge, Mr. Barefoot was less than 40 years of age. Of the 13 Eastern individuals, the eleventh-rated, Mr. Bill Ray, was also retained, and his age was less than 40 years.

So the average age of Zoecon's representatives who were retained was 40.7 years. The age of sales representatives who were terminated was 54.4 years. Of the 21 Zoecon sales representatives, 11 were age 40 and older on May 1st, 1986. Six were terminated by Sandoz Crop Protection, or 55 percent. Of the 21 Zoecon sales representatives, ten were less than age 40 on May 1st, 1986, and only one was terminated.

The average age for the Western Sales Region of the new company for the regional director and the six district managers was 33.9 years. The average age on May 1st, 1986 of all Western Region sales representatives was 33.8 years. The average age for the Sandoz Protection Corporation Western 1 managers and sales representatives as of May 1st, 1986, was 35.6 years, and that district included the geographic sales

territory that plaintiff had been employed in as a sales representative for Zoecon. On May 1st, 1986, the average age for all sales representatives for Sandoz Crop Protection Corporation in its Eastern sales region was 35.7 years. The average age on May 1st, 1986, for Eastern region manager and all district managers, not including District 5, was 38.2 years. On May 1, 1986, the average age of all Sandoz Crop Protection sales representatives in the Eastern and Western Regions combined was 34.7 years. On May 1, 1986, the average age of the Eastern and Western regional directors and district managers combined, not including the Eastern District 6, was 35.9 years.

Now, statistics may be slippery, as the Court has stated and capable of being manipulated, but how can a trier for fact ignore those statistics and fail for a moment

to see that this was the Youth Movement? This was the development of the "lean and mean" sales machine. Then when one's peers outnumber him substantially and most of them are 20 years younger than he is, the representation for the Over-the-Hill Gang is rarely strong; and particularly when you take the other phase of the statistics, as was being discussed last night, and deal with them in the group that Mr. Shutt was in, it seems to the Court that you're close to or past the four-fifths guideline--I think the figure was 85 percent--that is set forth in the state guidelines for the Equal Opportunity of Employment Commission.

Now, Mr. Damstrom, in support of the obvious impact, says that he simply relied on Lucas and the list, which is the forced rating, but the Court is troubled by the fact that if offered as a reasonable basis for

acceptance of these people's respective rating without any concern about the impact on the protected age group, then there was a totally inconsistent use of that rating, which the Court has already noted. He claims that Svoboda was offered a job; he was eighth in the rating, below the plaintiff.

We know that Barefoot and Ray in the East, who are ranked about as low as you can get in that 13 staff--the force back there--were retained, and we're not offered any explanation of any kind to explain the so-called "Lucas Forced Rating." Mr. Clayton wants to be disassociated with that, and I think he's entitled to be. However, if it's to be employed as a justification for this adverse and disparate impact in the statistical amount that the Court has noted, then it seems to me that you can't have it both ways. You can't run with the hare and

hold with the hound! So, then, because of its inconsistent use, if that does not furnish a justification for this impact, we're left with none. No other effort was made to obtain these people's work records--which were available--and to make some assessment to determine whether in fact they were "Top performers" within the definition of the term.

The Court regards the so-called "feedback" from Bever to Dodson to Damstrom with little more impression than apparently Mr. Damstrom Did. Nor does the Court feel that clearance from the affirmative action office would justify ignoring this disparate impact. She admits recognizing it, being concerned about it, and then getting some relief by discussions with these other people of the manner and reasons why they made their selection and felt that the process passed muster. Is she did so, why did she then

condone a variance from the Lucas forced rating, which was the only basis she had or could have had to justify the selection that was made? If that furnished the only basis for selection and the only possible justification for Mr. Shutt's discharge--certainly the only reasonable basis for Mr. Shutt's discharge--then it had to be adhered to consistently or it became a mockery and a subterfuge.

The Court is sympathetic to her situation, just as it is to Mr. Damstrom's situation, because of the fact that they were pressed to do this, to get it over, to get the merger accomplished, apparently at the direction of people who didn't favor us with their appearance; but that doesn't excuse the result that occurred. In an organization of any kind, of any size--any appreciable size--there

is no one who is more quick to agree that youth must be served than the young.

There has been no showing by the defendants that the requirement which the Court has been discussing of being a "top performer" was a manifest business reason, and no showing that it could only be met by people who are under or around the age of 40 years old. There is certainly no showing--and the evidence is quite to the contrary--that it couldn't have been met by Mr. Shutt. The Court regards him as qualified and competent, and surely within those standards which it is seen were used to assess the defendants' employees.

The Court further is confident that he would have had no trouble selling Banvel, and as a matter of fact, his income and the income of the district would have been substantially increased by sales of it. Again,

in this Valley we are all aware of the constant change and development of various products. Right now, we're painfully aware of some, and we know that people involved in this very special trade must be able to learn and pick up and assimilate new products and develop markets for them. He certainly has developed or demonstrated his ability to do that.

Accordingly, the Court concludes that the impact of this merger and the re-alignment impacted in disparate fashion those within a protected age group, including Mr. Shutt, and was in violation of Title VII and the laws of the State of Washington. This finding obliges the Court, still in its position as the trier of fact, to render an assessment of damages, again to be rendered in accordance with the appropriate law.

The Court is going to award actual damages through March 31st to date of $88,961. In case you want to check the Court's arithmetic--and that's always a worthy undertaking--that is the figure presented in the Schedule of Actual Damages in Exhibit 36, less what the Court recalls being $9,200, which is owed Mr. Shutt by the corporation which he worked for without compensation for so long. This defendant shouldn't have to pay the default of somebody else. He can't look to the Sandoz Corporation for compensation in that area.

Otherwise, the court finds that those are appropriate items of damages, reasonable in their presentation, and not to be reduced by any mitigation of damages, which the Court will address in a moment.

The Court would allow interest on that amount from the date of discharge. The

Court is obliged to double that amount, but is only going to grant interest--prejudgment interest--on half of it, if you understand. The Court does not feel that the law requires interest on the doubled portion. That always must await a determination, such as the one the Court just made.

So, however you wish to approach it, if you want to double it first and allow interest only on half of it, or compute the interest first and double it, minus the interest--whatever bookkeeping manner you employ, that will be the allowance of the Court.

Now, the Court in this area is impressed by reasoning of the appellate court of this state on the issue of distress--mental and emotional distress. The Court is, of course, referring to the determination found in the case of Cagle v. Burns & Roe at 106 W.2d--I believe it's at 911--which, again, is

a case which this Court certified to the Supreme Court for a determination. Their ruling in that case was that if the tort is intentional or willful in nature--and the Court has just indicated that it felt that this very unfortunate result was in large part due to the pressures of time that this corporation was involved in; a feeling that the actual people involved indicated clearly to the Court by their statements and by their manner--that they would have liked to have done this a lot differently. They would have liked to have had a lot more time in which to accomplish this. The Court is slow to put any discriminatory intent to their personal conduct, but this is a corporate defendant, and the Cagle case indicates that "intentional" is intentional in the tort sense--in other words, if you intend the act which produces a result which violates public

policy, that's a sufficient showing to justify what they themselves say is their very liberal approach to this kind of intangible damage.

The Court has no difficulty in the figure that Mr. Johnson suggests of $20,000. The trauma to a man the age of the plaintiff being thrust out of his life's work, the embarrassment of being unemployed, the insecurity from the certainty that employment is going to be hard to come by at best and even harder when he has to pass out a resume indicating he was with this company for eight years and was terminated--his wife said it very well when she talked about the damage to his self esteem.

The Court has a full appreciation for that and will award $20,000 to compensate the plaintiff for emotional distress. The only real question in the Court's mind with regard to that allowance is as to whether or

not it shouldn't be allowed to his wife, who has had to put up with him around the house for the last two and a half years.

Now, we come to the matter of front pay. This remedial law gives the Court broad authority--both equitable and legal powers to be exercised; so the Court can, in its discretion, order reinstatement or front pay--that is, present value of everything that this man presumably would lose until his normal retirement age of 65; and that's all laid out, again, in a fashion most thorough by a witness who is a well respected accountant in this community. The Court has, again, no difficulty with its decision in that regard.

Mr. Shutt has had trouble finding a job, but the Court is going to find him one today. I'm going to order his reinstated. I am going to order him reinstated in the territory he was in when he was terminated. I am

going to order him reinstated at the salary which he would have received, given normal increases, up to the time of his discharge, which is going to be 60 days from today.

I appreciate that the defendant has, of necessity, need of some time to decide how they're going to accommodate Mr. Shutt in their sales staff, but it only required 60 days to decide to terminate him; it seems to me that 60 days is sufficient time to put him back to work, and I think that's good for him. I think he's at a time in his life when he wants to work; he should work.

Now, I'm fully aware that he had an episode with Mr. Lucas, and having observed the personalities of each of them, that doesn't surprise me a bit; but I discern no hostility on the part of the people who will be his supervisors. I am going to begin with confidence that he can be assimilated in his

former position and serve out that period of time towards his retirement. I must appreciate that he has on occasion indicated something less than total regard for the defendant company, but I think most of that was inspired by this event, and I trust that he can get past that and go about his work and know the returns from that, the intangibles of which are just as important as the income he will receive.

As far as the other possible problem is concerned, this Court has every confidence in its ability to perceive retaliation and deal with it if it occurs.

On other matter, and that is the matter of attorneys' fees, and on that issue the Court wants counsel to submit a copy of their employment contract agreement--whether that be formal, by letter, or otherwise. The Court wants in affidavit form a breakout of

your hours and time, who spent it, what you did; and the Court will review that against the lodestar principles which abide that allowance in federal courts.

Mr. Moore, do you have a question?

MR. MOORE: May I inquire, Your Honor: If he is reinstated, what happens to the fact that in the period of time he has not been employed, he has not been contributing--there's been no contribution to pension rights?

THE COURT: Well, my understanding is that the damages assembled in the first schedule constituted a compensation for that very fact. I think--that was the Court's understanding, and if that needs to be addressed--but I think the Court properly understands Mr. Seelig's presentation to have compensated for that. Now, there may be some lag, but you can't have it both ways ---

MR. MOORE: I understand.

THE COURT: ---to compensate him for that.

(Whereupon, the trial was concluded.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

VINCENT F. SHUTT, Plaintiff, vs. SANDOZ CROP PROTECTION CORPORATION, a New York corporation, and ZOECON CORPORATION, Defendants.	)	No. C-87-166-AAM JUDGMENT

The following constitutes the Judgment of the Court:

I.

All conclusions of law stated by the court in its oral decision rendered March 31, 1989, are hereby incorporated by reference into this document as conclusions of law in this decision.

II.

The court has personal jurisdiction over the parties hereto, and has subject-matter

jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1332. This court also has pendent jurisdiction over the plaintiff's state law claims, arising under R.C.W. 49.60, the Washington Law Against Discrimination, pursuant to 28 U.S.C. § 1441.

III.

The plaintiff was involuntarily discharged from employment by the defendants on July 15, 1986.

IV.

At the time of the plaintiff's discharge from employment by the defendants, he was within the protected age group of both 29 U.S.C. § 621, et seq., the Age Discrimination in Employment Act, and R.C.W. 49.60.180, the Washington law against discrimination.

V.

At the time of the plaintiff's discharge by the defendants, his work performance was

more than satisfactory. The plaintiff was and is well qualified for employment by Sandoz as an agricultural chemical sales representative in the northwest United States.

VI.

At the time of the plaintiff's discharge by the defendants, he was replaced in his sales territory and job position by four former Velsicol/V.S. Crop Protection sales representatives employed by Sandoz, all of whom are younger than the plaintiff, the oldest of the four at that time being age 40.

VII.

The manner in which the structure of the new company's sales organization was decided, and the practices used by the defendants in selecting which individual sales representatives from Velsicol/V.S. Crop Protection and Zoecon would be retained or terminated, although facially neutral in appearance, had a

harsh, disparate and discriminatory impact upon Zoecon sales representatives age 40 and over, including the plaintiff.

The statistical evidence in this regard is compelling, and no reasonable trier of fact could ignore it. It is apparent from the evidence that there was a youth movement within the new company. The plaintiff clearly established a prima facie case of disparate impact age discrimination.

VIII.

The burden of coming forward with evidence then shifted to the defendants to demonstrate that the methods and practices used had a manifest relationship to the employment. The defendants assert that their decisions were based on the force rank provided by Mr. Lucas, on customer reactions provided by Mr. Bever, and on a company desire

to retain sales representatives with strong dicamba sales experience.

The court concludes that the plaintiff is and was fully capable and qualified to sell dicamba herbicides for the new company. The court is totally unimpressed with the customer reaction evidence.

The force rank provided by Mr. Lucas was applied so inconsistently with regard to the plaintiff, especially regarding Mr. Svoboda, Mr. Barefoot and Mr. Ray, that the court concludes that it provides no justification for the adverse and disparate impact upon Zoecon sales representatives age 40 and over. Without the force rank, the court is left with no evidence before it to establish any justification on the part of the defendants to explain this adverse and disparate impact, especially since the personnel files of the Zoecon representatives were never reviewed by

the defendants prior to the termination of the plaintiff and other Zoecon representatives. The evidence offered by the defendants of the practices utilized in deciding to terminate the plaintiff and other Zoecon representatives was mere pretext or disguise for discrimination.

IX.

The plaintiff sustained his burden of proving that the employment practices utilized by the defendants in carrying out the merger of the sales forces of the two companies had a significant, discriminatory and disparate impact on those individuals age 40 and over, including the plaintiff, and constituted a violation of the Age Discrimination in Employment Act and the Washington state laws against discrimination on basis of age.

X.

The defendants' violation of federal and state anti-discrimination laws directly and proximately caused the plaintiff actual damages from July 15, 1986 through March 31, 1989. The court finds that the plaintiff's actual damages totalled $88,961.00 and that these damages are appropriate and reasonable in amount and will not be reduced by the defendants' affirmative defense of the lack of mitigation.

XI.

The plaintiff is entitled to recover pre-judgment interest against the defendants on the principal amount of his actual damages, $88,961.00, at the rate of 13.04% per annum, between July 15, 1986 and March 31, 1989, in the amount of $31,418.05. This interest rate was calculated based upon the formula described in R.C.W. 19.52.020(1)

XII.

The court finds the defendants' violation of the ADEA and the Washington state law against discrimination to be "willful" for the purposes of these Acts. The manner in which the new company's sales organization was formed and the employment practices used to decide which sales representatives would be retained or terminated reflected an intent by the defendants to have a youthful sales organization in violation of the law.

The review of the defendants' procedures and practices, the recommended sales organization, and the recommended terminations and retentions by the defendants' affirmative action officer, Ms. Sullivan, did not lessen the disparate and discriminatory impact on the protected group, nor did it make the defendants' violation of the law any less willful. Ms. Sullivan knew the ages of those

being terminated and retained, and was concerned that 85% of the Zoecon sales representatives age 40 and over were being terminated. Yet she approved the proposed retentions and terminations and, therefore, condoned the variance from, and totally inconsistent application of, the Zoecon force rank provided by Mr. Lucas. The defendants' violation of the ADEA and the Washington law against discrimination was willful, and was in reckless disregard of the law.

XIII.

Due to the willful nature of the violation of the law, the plaintiff is entitled to recover liquidated damages against the defendants in the amount of $88,961.00 which is equal to the amount of plaintiff's actual damages.

XIV.

The plaintiff is entitled to recover money damages against the defendants for his emotional distress caused by the defendants' intentional and discriminatory termination of his employment under Washington state law, based upon Cagle v. Burns & Rowe, Inc., 106 Wash.2d 911, 726 P.2d 434 (1986). The court finds that the defendants' wrongful termination of the plaintiff's employment was intentional in that the defendants intended the act that resulted in the plaintiff's emotional distress. The plaintiff's evidence established objective symptoms of emotional distress, and the court finds that the sum of $20,000.00 is an appropriate and reasonable amount to award the plaintiff for his emotional distress damages.

XV.

The plaintiff is the prevailing party herein and as such he is entitled to recover

his reasonable attorneys' fees against the defendants pursuant to federal and state statutes. The court finds that the amount of $83,437.00 is a reasonable sum to allow the plaintiff as attorneys' fees. The court relies on the authority of National Wildlife Federation v. FERC, No. 84-7325 (9th Cir. 1989), and Allard v. First Interstate Bank, 112 Wash.2d 145, ___ P.2d ___ (1989), as well as the information in the record provided by counsel, as its basis for computing this figure.

XVI.

The plaintiff is also entitled to recover his taxable costs and disbursements incurred herein in the amount of $1,753.60.

XVII.

The court has concluded that the appropriate remedy for "front pay" damages is not an award of money damages. Rather, the

court concludes that the plaintiff wants to continue to work as an agricultural chemical sales representative, and that he should continue to do so. Accordingly, the court orders the defendants to reinstate the plaintiff as an agricultural chemical sales representative in the sales territory to which he was assigned at the time of his discharge within 60 days of the date of entry of this judgment. The plaintiff shall be reinstated as an employee with full benefits and at the same salary level he was at on July 15, 1986, augmented by all intervening, normal salary increases.

XVIII.

At the time of discharge, the plaintiff was an employee of Zoecon Corporation. He was discharged by an agent of Sandoz Crop Protection. Zoecon was merged with V.S. Crop Protection Corporation to form Sandoz Crop

Protection Corporation. At the time of plaintiff's discharge, both defendant corporations were owned by Sandoz, Limited. Accordingly, the liability of the defendants to the plaintiff herein is joint and several.

XIX.

The document constitutes the Judgment of the Court pursuant to Fed. R. Civ. P. 58. The Clerk is hereby directed to enter judgment herein in favor of the plaintiff, and against the defendants, in the form and to the extent described above, pursuant to Fed. R. Civ. P. 79(a).

DONE BY THE COURT this ___ day of May, 1989.

/s/
ALAN A. McDONALD
United States District Judge

Supreme Court, U.S.
FILED
FEB 21 1992
OFFICE OF THE CLERK

No. 91-1201

In The

Supreme Court of the United States

October Term, 1991

VINCENT F. SHUTT,

Petitioner,

v.

SANDOZ CROP PROTECTION CORPORATION, a New York corporation; ZOECON CORPORATION, a Delaware corporation,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR SANDOZ CROP PROTECTION CORPORATION AND ZOECON CORPORATION IN OPPOSITION

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No. 91-1201

In The

Supreme Court of the United States

October Term, 1991

VINCENT F. SHUTT,

Petitioner,

v.

SANDOZ CROP PROTECTION CORPORATION, a New York corporation; ZOECON CORPORATION, a Delaware corporation,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR SANDOZ CROP PROTECTION CORPORATION AND ZOECON CORPORATION IN OPPOSITION

OPINIONS BELOW

The Opinion of the court of appeals is reported at 923 F.2d 722 and the Orders and Amended Opinions of the court of appeals are reported at 934 F.2d 186 and 944 F.2d 1431.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1991, and a timely petition for rehearing was filed on January 28, 1991. (Respondents Appendix 1.) On May 31, 1991, the court of appeals, without ruling on the petition for rehearing, entered its order and amended opinion. On June 13, 1991, another petition for rehearing was filed and on September 25, 1991, the court of appeals denied the petition for rehearing. (Respondents Appendix 2.) On September 30, 1991, the court of appeals further amended the opinion filed on January 16, 1991. The petition for a writ of certiorari was initially filed on December 30, 1991, 96 days after the court of appeals denied the petition for rehearing[1]. Accordingly, because the petition for certiorari was not filed timely per Supreme Court Rule 13.4, this Court has no jurisdiction over the petition.

STATEMENT

1. In 1986, Sandoz Corporation purchased the assets of the agricultural chemical business of Velsicol Chemical Corporation. Following this purchase, this business was known as VS Crop Protection Corporation (VS Crop). In May 1986, Sandoz announced that it would merge VS Crop with the agricultural chemical business of one of its

[1] The Clerk of this Court refused to accept the Petition for filing because it failed to comply with Supreme Court Rules. On January 21, 1992, Petitioner re-filed his Petition with the Court. Respondents received this corrected Petition on January 24, 1992.

other subsidiaries, Zoecon Corporation (Zoecon), effective June 2, 1986. At that time, Zoecon employees would become subject to the management of VS Crop, and the merged entity would be known as Sandoz Crop Protection Corporation.

VS Crop was a much larger operation than Zoecon. VS Crop had 85 sales representatives in an equal number of sales territories and its 1985 sales totaled $100 million, whereas Zoecon had only 21 sales representatives in 21 sales territories and $21 million in sales in 1985. VS Crop's sales were dominated by a few products such as Banvel, a dicamba-based herbicide. Zoecon's products did not include Banvel or any other dicamba-based herbicide.

In the reorganization under the supervision of VS Crop, 79 sales territories were created. Because the combined sales forces of Zoecon and VS Crop totaled 106 sales representatives, there were 27 more sales representatives than there were sales territories. It became a business necessity for a number of salesmen to be terminated. All of the persons making decisions for the merged company were former managers of VS Crop.

The termination decisions were based on subjective evaluations of the work of the salesmen. Because the new managers were not familiar with Zoecon they relied in part on a ranking of salesmen for Zoecon made by Zoecon's former national sales director. This ranking was not followed slavishly. For example, Mike Svoboda, age 63, who was ranked eighth in the Western Region, was offered a chance at a transfer, while Petitioner, who was ranked seventh in the Western Region, was terminated. In

the Eastern Region the two men at the top of the list, who were over age 40, were retained, but of the five men at the bottom of the list two were also retained who were under age 40 and three were discharged who were respectively 66, 38 and 54. Petitioner, then age 56, had been a Zoecon salesperson in a territory that included Washington, Oregon, Idaho, and Montana. At the same time, VS Crop employed four sales representatives in the Pacific Northwest whose combined territories basically mirrored Petitioner's territory.

In the combined pool of 106 VS Crop and Zoecon sales representatives, there were 32 employees over age 40 and 74 employees under age 40 before the reduction in force. Of the 21 Zoecon sales representatives, 11 were age 40 or older and 10 were under age 40. Six of the Zoecon salesmen were terminated, one was given a chance to transfer, and 14 were retained. Of the six who were terminated, five were age 40 or older. Petitioner was among the Zoecon sales representatives who were terminated. Of the VS Crop salesmen terminated, two were over age 40 and two were under age 40. In all, 21 of the 85 original VS Crop sales representatives were over age 40.

Petitioner's discharge was effective July 15, 1986. VS Crop Management retained the four former VS Crop salesmen, of whom three were under age 40, to cover their Pacific Northwest territories.

2. Relying on the discharge of the seven Zoecon sales representatives, the district court concluded as a matter of law that the manner in which individual VS Crop and Zoecon sales representatives had been chosen for retention "had a harsh, disparate and discriminatory

impact on Zoecon sales representatives age 40 and over, including the plaintiff [Vincent Shutt]." The district court gave judgment for Petitioner, which Respondents appealed.

3. On January 16, 1991, the court of appeals reversed the judgment of the district court and remanded the cause with instructions that judgment be entered in defendants' favor. Initially, the court of appeals, citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988), noted that in a disparate impact case the statistical disparities must be "sufficiently substantial that they raise . . . an inference of causation" and that statistical evidence may not be probative if the data are "small or incomplete." The court of appeals went on to note that in reaching its decision as to disparate impact liability, the trial court had focused on "an exceedingly small class of employees, the 21 former salesmen of Zoecon." Focusing on the discharges in both the Zoecon and VS Crop sales forces, the court of appeals noted that there were seven discharged who were age 40 and over and four discharged who were under age 40. The court of appeals went on to explain:

> The group of 11, however, is so small that it does not alone suffice to establish a statistical pattern that could conclusively be identified as discriminatory. Moreover, Shutt concedes that there was no discrimination against the former Velsicol/VS Crop group. The employment practice to which he objects he contends was directed only against the Zoecon group. The Zoecon group does not prove his case.

The court of appeals concluded that the case presented by Shutt was analogous to that which it faced in *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072 (9th Cir. 1986). In that case, the court of appeals stated:

> The problem with small labor pools is that slight changes in the data can drastically alter appearances. Consequently, in 1979, the EEOC concluded that statistics from small applicant pools such as a pool of 30 persons are not dispositive. 44 Fed. Reg. 11, 999 (1979). 804 F.2d at 1076.

Finally, the court of appeals acknowledged, as it had in *Sengupta*, that in some instances, courts must rely on small sample groups, but that in Shutt's case "there existed no necessity to employ a small group."

ARGUMENT

1. THE PETITION IS UNTIMELY AS IT WAS FILED MORE THAN 90 DAYS AFTER THE COURT OF APPEALS DENIED THE PETITION FOR REHEARING.

"The initial question in this case is one of jurisdiction – whether the petition for certiorari was filed within the period allowed by law." *F.T.C. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 207 (1952). "Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below." *Missouri v. Jenkins*, 495 U.S. 33, 109 L.Ed.2d 31, 50 (1990). As this Court explained in *Jenkins*: "This 90 day

limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits." *Id.* Moreover, Sup. Ct. R. 13.4 provides in part:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered . . . . However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

In this case, judgment was entered by the court of appeals on January 16, 1991, the file date on the court's decision. Petitioner filed a petition for rehearing, which was denied on September 25, 1991.[2] Petitioner had until December 24, 1991 in which to file his petition with this Court. Because Petitioner did not file until December 30, 1991, the Petition is untimely and must be dismissed for lack of jurisdiction.

Petitioner tries to divert this Court's attention from his untimely filing by not disclosing the denial of his petition for rehearing in his statement of jurisdictional grounds, as required by Rule 14.1(e)(ii), and by inaccurately stating that the Court's judgment was filed on September 30, 1991 (Pet. at 2). The opinion plainly states that it was filed on January 16, 1991, and in the Ninth Circuit the judgment is incorporated into the opinion. On September 30, 1991, the court of appeals made minor

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[2] In addition, no active member of the court of appeals voted for *en banc* consideration as suggested by Petitioner.

amendments to its opinion. The court of appeals did not amend its judgment reversing the district court's judgment and remanding the case with instructions that judgment be entered for the defendants. Therefore, Petitioner cannot use the September 30, 1991 amendments to trigger a new period of time in which to file with this Court.

Furthermore, even if the September 30, 1991 amendment to the opinions were somehow deemed to have modified the January 16, 1991 judgment, they form no basis for starting anew the time in which Petitioner had to file with this Court. In *Minneapolis-Honeywell Regulator Co.*, this Court stated:

> Only when the lower court changes matters of substance or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or which . . . a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. 346 U.S. at 211.

The September 30 amendments to the opinion do not change any matters of substance or resolve any ambiguity in the January 16 judgment. The amendments can best be described as editorial in nature. Similarly, the September 30 amendments to the opinion do not disturb or revise any legal rights set forth in the January 16, 1991 judgment. The September 30, 1991 amended opinion carries the same judgment issued on January 16, 1991: reversed and remanded with instructions that judgment be entered in defendants' favor. Thus, the September 30 amended

opinion is not a "subsequent judgment" as that term is used in Rule 13.4. Petitioner cannot point to one item amended by the September 30 Order that forms the basis for his Petition that did not exist prior to the amendments. Accordingly, the September 30 amendments did not cause the 90 day filing period to begin to run anew. Therefore, since Petitioner failed to file his petition within 90 days after the court of appeals denied his petition for rehearing, this Court has no jurisdiction over this case.[3]

2. THE COURT OF APPEALS CONCLUSION THAT A SAMPLE OF ELEVEN EMPLOYEES IS TOO SMALL TO BE PROBATIVE OF A DISPARATE IMPACT DISCRIMINATION CLAIM DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND THUS PRESENTS NO ISSUE FOR THIS COURT TO REVIEW.

Apart from the jurisdictional deficiencies, this Court should deny the petition for a writ of certiorari because it presents no issues worthy of this Court's review. The first issue presented in the petition is whether the court of appeals properly concluded that a sample pool of 11 employees was too small to support a finding of disparate impact discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621. This Court has consistently noted that a small sample size will "detract

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[3] *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 378-84 (1965) and *U.S. v. Adams*, 383 U.S. 39, 41-42 (1966), are not to the contrary. In each of those decisions the amended judgments either decided new issues (*Adams*) or resolved a genuine ambiguity (*Colgate-Palmolive*).

from the value of such [statistical] evidence." *Teamsters v. United States*, 431 U.S. 324, 339-40 n. 20 (1977). More recently in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996-97 (1988), this Court explained that statistical evidence based on "small or incomplete" samples may not be probative of discrimination in a disparate impact case. In the instant case, the court of appeals held that the district court erred in considering only the terminations of seven Zoecon sales representatives. The court of appeals further held that as a matter of law that the 11 sales representatives terminated from both Zoecon and VS Crop was too small of a sample to be probative of discrimination. The court of appeals' conclusion that a sample of 11 employees was too small to be probative of disparate impact age discrimination comports with this Court's decisions, decisions of other courts of appeals, and hardly merits this Court's review. *See, e.g., Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974) (sample size of 13 too small); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 943 (6th Cir. 1987) (17 employees); *Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984) (ten terminations); *Pace v. Southern Ry. System*, 701 F.2d 1383, 1389 (11th Cir. 1983), *cert. denied* 464 U.S. 1018 (1983) (12 employees); *Coble v. Hot Springs School District No. 1.*, 682 F. 2d 721, 734 (8th Cir. 1982) (15 or 18 employees).

Contrary to Petitioner's contention (Pet. 6-7), the court of appeals' decision regarding the sample size does not conflict with decisions from other circuits or the Ninth Circuit's decision in *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072 (9th Cir. 1986). Of course, an intra-circuit conflict is not a basis for granting the Petition,

particularly, where as here, the court of appeals has considered the argument and rejected it when it denied the petition for rehearing and rejected the suggestion for *en banc* consideration. See Rule 10. Furthermore, none of the cases cited by Petitioner from other courts of appeals hold that a group of 11 terminated employees is sufficiently large, by itself, to establish a statistical pattern that could be conclusively identified as discriminatory in a disparate impact case. In each of the cited cases there is a recognition of the problems inherent in using small samples in discrimination cases. In *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1058 (8th Cir. 1988), the court of appeals painstakingly noted that it was not sanctioning the use of small samples in disparate impact cases, such as this, where statistical patterns are the entire basis of the plaintiff's claims. In *EEOC v. American Nat. Bank*, 652 F.2d 1176, 1194 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982), the court of appeals was willing to consider a small statistical sample only in the context of "the total range of hiring decisions affecting all categories during a charged period of discrimination." This is not what Petitioner did here. In *Pegues v. Mississippi State Employment Service of Mississippi Employment Security Comm.*, 699 F.2d 760 (5th Cir. 1983), *cert. denied*, 464 U.S. 991 (1983), the court of appeals drew an inference of discrimination in referrals based on a small sample when the standard deviations exceeded 17 (*see* 699 F.2d at 768 n.9) and there was other evidence of discrimination, but refused to find disparate impact liability in testing on the basis of a sample larger than that presented in the instant case where there were no "evidentiary signals of discrimination typically relied upon to bolster such analyses." *Id.* at 774.

Here, Petitioner made no showing of statistical significance. Moreover, there were no "evidentiary signals of discrimination." The court of appeals noted that the fact that the VS Crop Managers may have favored their former employees may have been favoritism but it was not age discrimination. In addition, Petitioner conceded that there had been no discrimination against the VS Crop employees. Furthermore, notwithstanding Petitioner's assertion (Pet. at 7-8), the court of appeals has not stated that an employer must have a minimum number of employees before a disparate impact case can be made. The court of appeals decision is based on the size of the sample, not the size of the employer. Additionally, the court of appeals recognized, as it had in *Sengupta*, that under certain circumstances courts may need to rely on small sample groups, but concluded that in this case "there existed no necessity to employ a small group." The court of appeals' conclusion in this regard comports with decisions from other courts of appeals, including those cited by Petitioner.

3. THE COURT OF APPEALS PROPERLY CONSIDERED THE ISSUE OF SAMPLE SIZE ON APPEAL AS IT HAD BEEN RAISED TO THE DISTRICT COURT AND, IN ANY EVENT, THE COURT OF APPEALS HAD DISCRETION TO HEAR IT.

Finally, there is no merit in Petitioner's contention (Pet. 8) that Respondents raised the issue of sample size for the first time on appeal. This issue was addressed in briefs filed with the district court. *See Watson v. Fort Worth Bank*, 487 U.S. 977 (1988) (plaintiff's statistical evidence may be attacked in briefs filed with the court).

Furthermore, the Petitioner waived this waiver argument, as he first presented it to the court of appeals in his petition for rehearing after the court of appeals had entered judgment on January 16, 1991. See *Geva v. Leo Burnett*, 931 F.2d 1220, 1225 (7th Cir. 1991). In any event, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the court of appeals to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). An appellate court would certainly be justified in considering an issue for the first time on appeal where, as here, "the proper resolution is beyond any doubt. . . . " *Id.*[4]

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[4] Contrary to Petitioner's suggestion (Pet. 11), *Schlesinger v. Councilman*, 420 U.S. 738, 743 (1975), does not support his argument. *Schlesinger* holds that this Court may consider issues not raised below or in the Petition. *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENTS APPENDIX NO. 1

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #:89-35502 Filed: 7/28/89
Nsuit: 4190 Other contract (Div)
Shutt v. Zoecon Corp, et al, et al
Appeal from: Eastern District of Washington (Spokane)

Case type information:
1) civil
2) private
3)

Lower court information:

District: 0980-2 : CV-87-166-AAM
presiding judge: Alan A. McDonald, District Judge
Date Filed: 3/4/87
Date order/judgment: 7/7/89
Date NOA filed: 7/20/89

Fee status: paid

Prior cases:
None
Current cases:

	Lead	Member	Start	End
companion:	89-35379	89-35502	7/28/89	

Proceedings include all events.
89-35502 Shutt v. Zoecon Corp, et al, et al

[89-35502]

9/14/90 Filed order CONFATT (KWM) the clerk is requested to schedule this case for oral argument in Seattle the week of 12/3/90. Counsel for aplts is requested to send a copy of its reply brief filed on 7/18/90 to counsel for aple. Within 30 days from the entry of this order, aplts shall dismiss No. 89-35379 or show cause why it should not be dismissed for lack of jurisdiction. [89-35379, 89-35502] (jr) [89-35379 89-35502]

10/1/90 Calendar check performed [89-35502] (th) [89-35502]

10/18/90 CALENDARED: SEATTLE Dec 4, 1990 9:00 am [89-35502] (aw) [89-35502]

12/4/90 ARGUED AND SUBMITTED TO: GOODWIN, WRIGHT, NOONAN [89-35502] (dt) [89-35502]

12/10/90 Rec's aple's add'l citations; served on 12/7/90 to (panel). [89-35502] (jr) [89-35502]

1/16/91 FILED OPINION: REVERSED REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. GOODWIN; WRIGHT; NOONAN, author.) FILED AND ENTERED JUDGMENT. [89-35502] (ck) [89-35502]

1/30/91 [1874586] Filed original and 40 copies Appellee Vincent F. Shutt's petition for rehearing with suggestion for rehearing en banc 14 p.pages, served on 1/28/91. (PANEL & ALL ACTIVE JUDGES) [89-35502] (jlc) [89-35502]

5/31/91 Filed order and amended opinion (Judges Alfred T. GOODWIN, Eugene A. WRIGHT,

John T. NOONAN, author) (Orig. opinion id: [1868058-1]) The opinion filed 1/16/91 is amended as follows: (SEE CASEFILE FOR COMPLETE TEXT) [89-35502] (ck) [89-35502]

6/18/91 Filed order (John T. NOONAN): aplts are directed to file by 7/12/91 a response to the petition for rehearing. [89-35502] (jlc) [89-35502]

6/18/91 [1950132] Filed original and 40 copies Appellee Vincent F. Shutt in 89-35502 petition for rehearing with suggestion for rehearing en banc 11 p.pages, served on 6/13/91. (PANEL & ALL ACTIVE JUDGES) [89-35502] (jlc) [89-35502]

7/11/91 Filed Appellant Zoecon Corporation in 89-35502, Appellant Sandoz Crop in 89-35502's response to petition opposing petition for enbanc rehearing [1874586-1] served on 7/10/91. (aplt has submitted an orig & 4 copies – notified to submit 36 more copies) (PANEL) [89-35502] (jlc) [89-35502]

7/25/91 Received an addl. 36 copies of Sandoz Crop Protection Corporation's & Zoecon Corporation's response to petition for rehearing. (ALL ACTIVE JUDGES) [89-35502] (jlc) [89-35502]

9/25/91 Filed order (Eugene A. WRIGHT, Alfred T. GOODWIN, John T. NOONAN): the petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected. [89-35502] (jlc) [89-35502]

9/30/91 Filed order and amended opinion (Judges Alfred T. GOODWIN, Eugene A. WRIGHT, John T. NOONAN) (Orig. opinion id:) REVERSED & REMANDED. The opinion filed 1/16/91 and amended 5/31/91, is further

	amended as follows: (see text) [89-35502] (jlc) [89-35502]
10/22/91	MANDATE ISSUED [89-35502] (jlc) [89-35502]
2/7/92	Received notice form Supreme Court: petition for certiorari filed Supreme Court No. 91-1201 filed on 12/30/91. [89-35502] (jlc) [89-35502]

RESPONDENTS APPENDIX NO. 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VINCENT F. SHUTT, Plaintiff-Appellee, vs. SANDOZ CROP PROTECTION CORPORATION, a New York corporation; ZOECON CORPORATION, a Delaware corporation, Defendants-Appellants.	No. 89-35502 DC# 87-166-AAM ORDER (Filed Sep. 25, 1991)

Before: WRIGHT, GOODWIN and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Noonan has voted to reject the suggestion for rehearing en banc and Judges Wright and Goodwin so recommend.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.